FILE COPY

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 69

CECIL JONES, PETITIONER,

vs.

UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 18, 1959

CERTIORARI GRANTED MAY 18, 1959

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 69

CECIL JONES, PETITIONER,

vs.

UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

INDEX

[fol. 1]

IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Crim 1022-57

Commissioner's Docket No. 4

Case No. 1802

UNITED STATES OF AMERICA

v.

Premises—1436 Meridian Place, N.W., D. C., Apartment 36, Including Window Spaces. Occupied by CECIL JONES, and EARLINE RICHARDSON

SEARCH WARRANT—August 21, 1957

To Robert V. Murray, Chief of Police, D. C., or any other person authorized to serve same.

Affidavit having been made before me by that he has reason to believe that on the premises known as 1436 Meridian Place, NW, D.C., apartment 36, including window spaces, in the District of Columbia there is now being concealed certain property, namely heroin, syringes, tourniquets, cookers, and paraphernalia used in the preparation of heroin for retail. Any other paraphernalia used in the preparation and dispensation of heroin and any other narcotic drugs. Any other narcotic drugs illegally held. The facts to sustain this are set forth in the affidavit attached hereto and made a part thereof.

which are in violation of U.S. Code, Title 26, Section 4704a and which are being held illegally.

and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the premises above described and that the foregoing grounds for application for issuance of the search warrant exist.

You are hereby commanded to search forthwith the place named for the property specified, serving this warrant

and making the search at any time in the day or night [1] and if the property be found there to seize it, leaving a copy of this warrant and a receipt for the property taken, and prepare a written inventory of the property seized and return this warrant and bring the property before me within ten days of this date, as required by law.

Dated this 21 day of August, 1957.

James F. Splain, U.S. Commissioner.

[fol. 2] Return

I received the attached search warrant August 21, 1957, and have executed it as follows:

On August 21, 1957 at 5.45 o'clock P.M.; I searched the premises described in the warrant and

I left a copy of the warrant with Cecil Jones together with a receipt for the items seized.

The following is an inventory of property taken pursuant to the warrant:

one (1) capsule white powder, suspected heroin
three (3) hypodermic Syringes
one (1) bottle top cooker
three (3) hypodermic needles
one (1) tourniquet (silk stocking).

This inventory was made in the presence of Det. Bertram Fogle and Det. John H. Bonaparte.

I swear that this Inventory is a true and detailed account of all the property taken by me on the warrant.

Thomas Didone, Jr.

Subscribed and sworn to and returned before me this 22 day of August, 1957.

James F. Splain, United States Commissioner.

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[1] The Federal Rules of Criminal Procedure provide: "The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time." (Rule 41C)

[fol. 3] Narcotic Squad, MPDC
August 21, 1957

Affidavit in Support of a U.S. Commissioners Search Warrant for Premises 1436 Meridian Place, N.W., Washington, D. C., apartment 36, including window spaces of said apartment. Occupied by Cecil Jones and Earline Richardson.

In the late afternoon of Tuesday, August 20, 1957, I, Detective Thomas Didone, Jr. received information that Cecil Jones and Earline Richardson were involved in the illicit narcotic traffic and that they kept a ready supply of heroin on hand in the above mentioned apartment. The source of information also relates that the two aforementioned persons kept these same narcotics either on their person, under a pillow, on a dresser or on a window ledge in said apartment. The source of information goes on to relate that on many occasions the source of information has gone to said apartment and purchased narcotic drugs from the above mentioned persons and that the narcotics were secreated in the above mentioned places. The last time being August 20, 1957.

Both the aforementioned persons are familiar to the undersigned and other members of the Narcotic Squad. Both have admitted to the use of narcotic drugs and display needle marks as evidence of same.

This same information, regarding the illicit narcotic traffic, conducted by Cecil Jones and Earline Richardson, has been given to the undersigned and to other officers of the narcotic squad by other sources of information.

Because the source of information mentioned in the opening paragraph has given information to the undersigned on previous occasion and which was correct, and because this same information is given by other sources does believe that there is now illicit narcotic drugs being secreated in the above apartment by Cecil Jones and Earline Richardson.

Det. Thomas Didone, Jr., Narcotic Squad, MPDC.

Subscribed and sworn to before me this 21 day of August, 1957.

James F. Splain, U.S. Commissioner, D. C.

[fol. 4] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Criminal Case No. 1022-57

UNITED STATES

v.

CECIL JONES

STIPULATION—Filed July 21, 1958

The parties agree that the record on appeal in this case should be supplemented by the following items:

1. Search Warrant, dated the 21st of August, 1957, one page and overleaf.

2. Affidavit in support of a U.S. Commissioners Search Warrant executed by Det. Thomas Didone, Jr., Narcotic Squad, NPDC, executed the 21st of August, 1957, one page.

3. This Stipulation.

Carl W. Belcher, Assistant United States Attorney.
Robert Marks, Attorney for Cecil Jones.

21st July, 1958.

[fol. 5] Clerk's Certificate to foregoing papers omitted in printing.

[fol. 6] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Commissioner's Docket No. 4

Case No. 1804

UNITED STATES OF AMERICA

v.

1. CECIL JONES

and

2. EARLINE RICHARDSON

COMPLAINT FOR VIOLATION OF U.S.C. TITLE 26 SECTION 4704A—Filed August 26, 1957

Before James F. Splain, U.S. Courthouse.

The undersigned complainant being duly sworn states:

That on or about August 21, 1957, at Washington in the District of Columbia Cecil Jones and Earline Richardson, did unlawfully possess a narcotic drug, to wit, heroin.

And the complainant further states that he believes that Det. John H. Bonaparte, Narc. Sqd. MPDC are material witnesses in relation to this charge.

Det. Thomas Didone Jr., Narcotic Squad, MPDC, Official Title.

Sworn to before me, and subscribed in my presence, August 22, 1957.

James F. Splain, United States Commissioner.

[fol. 7] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Title omitted]

FINAL COMMITMENT—Filed August 26, 1957

To: The United States Marshal of the District of Columbia:

You are hereby commanded to take the custody of the above named defendant and to commit him with a certified copy of this commitment to the custodian of a place of confinement within the District of Columbia approved by the Attorney General of the United States where the defendant shall be received and safely kept until discharged in due course of law. The above named defendant was arrested upon the complaint of Thomas Didone, Jr., Det. Narc. Sqd., MPDC charging that on or about August 21st, 1957, in the District of Columbia, the defendant did Unlawfully Possess Heroin. Held for Grand Jury, in violation of U.S.C. Title 26, 4704a and he, (after examination by me on August 22, 1957, where it appeared that there is probable cause to believe that the offense so charged has been committed and that he has committed it [1]), has been directed to furnish bond in the sum of Thirty-five hundred dollars ($3,500) for his appearance in the United States District Court for the District of Columbia at U.S. Court House, Wash. 1, D. C., in accordance with all orders and directions of the court relative to his appearance before the court, and he has failed to do so.

Dated: August 22nd, 1957.

James F. Splain, United States Commissioner.

Return

Received this commitment and designated prisoner on August 22, 1957, and on August 22, 1957, committed him

[1] Strike out the inappropriate portion.

to D.C. Jail August 22, 1957, and left with the custodian at the same time a certified copy of this commitment.

Carlton G. Beal, United States Marshal.

Dated: August 22, 1957.

By C. B. Collins, District of Columbia Deputy.

[fols. 8-9] MOTION FOR REDUCTION OF BAIL—Filed August 28, 1957

(Omitted in printing)

[fol. 10] ORDER DENYING MOTION FOR REDUCTION OF BAIL—September 6, 1957

(Omitted in printing)

[fol. 11] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Holding a Criminal Term

Grand Jury Impanelled August 29, 1957, Sworn in on September 3, 1957

[Title omitted]

Grand Jury No. 1111-57

INDICTMENT—Filed October 31, 1957

The Grand Jury charges:

On or about August 21, 1957, within the District of Columbia, Cecil Jones purchased, sold, dispensed and distributed, not in the original stamped package and not from the original stamped package, a narcotic drug, that is, one capsule containing a mixture totaling about 1.2

grains of heroin hydrochloride, quinine hydrochloride and milk sugar.

SECOND COUNT:

On or about August 21, 1957, within the District of Columbia Cecil Jones facilitated the concealment and sale of a narcotic drug, that is, one capsule containing a mixture totaling about 1.2 grains of heroin hydrochloride, quinine hydrochloride and milk sugar, after the said heroin hydrochloride had been imported, with the knowledge of Cecil Jones, into the United States contrary to law. This is the same heroin hydrochloride which is mentioned in the first count of this indictment.

Oliver Gasch, Attorney of the United States in and for the District of Columbia.

A true bill:

William E. Mattingly, Foreman.

[fol. 12] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Title omitted]

PLEA OF DEFENDANT—Filed November 8, 1957

On this 8th day of Nov., 1957, the defendant Cecil Jones, appearing in proper person and by his attorney (Will get counsel), being arraigned in open Court upon the indictment, the substance of the charge being stated to him, pleads not guilty thereto.

Deft. remanded to D. C. Jail.

By direction of:

James W. Morris, Presiding Judge Criminal Court #2, Harry M. Hull, Clerk.

Present: United States Attorney, By A. Burka, Assistant United States Attorney, M. Deeds, Official Reporter.

By H. Dodd, Deputy Clerk.

[fol. 13] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Title omitted]

MOTION TO DISMISS THE INDICTMENT—Filed November 12, 1957

I Cecil Jones, petitioner, in proper person file this motion in good faith and moves this court to "Dismiss the Indictment," brought against petitioner in (grand jury No. 1111-57) on grounds of "Falsified charges that" originated without "Probable Cause." Petitioner respectfully states as follows:

(1) Petitioner was arrested on August 21, 1957, as a result of an "uninvestigated tip" by an informer.

(2) Property was seized, not from petitioner and not from any of petitioner's personal property.

(3) The same seized property was used as evidence in having an indictment issued charging petitioner with "Violation of 26 U.S.C. 4704a and 21 U.S.C. 174."

Petitioner states that at the time of arrest a warrant was served on petitioner, stating that the same said warrant had been issued on grounds that the police had received information Cecil Jones and Earline Richardson were involved in the illicit narcotic traffic. The informer was "believed" to be reliable and the warrant issued. The arresting officers searched petitioner along with five other persons.

[fol. 14] Petitioner was taken to another room and shown a (1) capsule of white powder and told by the officer the capsule had been found in a "Birds Nest" and that petitioner along with Earline Richardson would be charged for having put it there. Petitioner contends that the place of arrest is not his home although he has stayed there before, which gave no grounds to believe that property not in his possession and not having marks of personal identification, belonged to petitioner. Petitioner states that the indictment placed against him should be dismissed since the charges are without sufficient com-

mendable qualities to indict and try petitioner for his liberty.

In reference to third party information petitioner cites the following:

P. 21 U.S. vs. Hill 114-F Supp. 441(1953)

Chief Judge Laws stated "Mere information from a third party "however reliable" that a felony is being committed, without an effort to check its accurracy by personal observation, stakeout, or survellance, would of itself be insufficient to either, issuance of a warrant or a search without a warrant.

Petitioner wishes to be present at verbal hearing of this motion.

[fol. 15] Certificate of Service

I certify that a copy of the foregoing motion was mailed to "Oliver Gash Esquire," United States Attorney for the District of Columbia at his address the United States District Court House for the District of Columbia this —— day of ——1957.

Cecil Jones, Movant.

Subscribed and sworn to before me this 7th day of November 1957.

G. E. Otes, Notary Public.

[fol. 16] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT, DISTRICT OF COLUMBIA CIRCUIT

MOTION FOR BILL OF PARTICULARS—Filed November 13, 1957

Comes now the petitioner in the above captioned cause. Respectfully moves the Court for a *Bill of Particulars:* and in support thereof it is stated as follows:

1. That the Petitioner is awaiting trial in this Court.

2. That there are *statements* in the Records of the Court made against petitioner by witnesses, on behalf of the prosecution.

3. That petitioner has *no defense* to present on (his) behalf due to having no knowledge of the crimes charged in the action against (him).

4. That the *statements* mentioned in paragraph (2.) will assist petitioner in (his) defense.

5. That without the said *statements* petitioner is handicapped and can present no defense, as well as being unable to obtain witnesses in (his) favor.

6. That being denied this relief, will deny petitioner "*due Process of Law*" to be confronted with accusing parties against (him).

[fol. 17] 7. That the said relief can be granted by the Court, by authority of a recent ruling cited in *Jencks* v. *United States* and by the *United States Constitution's 5th Amendment.*

/s/ Cecil Jones, Petitioner.

Prayer

Wherefore these premises considered petitioner prays for this relief: and respectfully moves the Court to grant this motion so that petitioner can be protected, and will not be deprived of *due Process of Law.*

/s/ Cecil Jones, Petitioner.

Proof of Service

I hereby certify a copy of the foregoing motion has this —— day of November, 1957, has been forwarded to the United States Attorney, Oliver Gasch, at his address, the United States District Court House, Wash., 1. D. C.

/s/ Cecil Jones, Petitioner.

Subscribed and sworn to this 12th day of November, 1957.

/s/ G. E. Otes, Notary Public, D. C.

[fol. 18] In United States District Court, Washington, District of Columbia Circuit

[Title omitted]

Affidavit in Support of Application for Leave to Proceed in Former Paupers—November 12, 1957

Petitioner being first duly sworn on oath according to law, deposes and says that (I) am the petitioner in the above action, and in support thereof it is stated as follows:

1. That I am a citizen of the United States.
2. That I am unable to pay the costs in the said action.
3. That I am unable to give security for the same.
4. That I believe I am entitled to the redress I seek in this action.

/s/ Cecil Jones, Petitioner.

Subscribed and sworn to this 12th day of November, 1957.

s/ G. E. Otes, Notary Public, D. C.

s/ —— ——, Judge's Approval.

[fol. 19] [File endorsement omitted]

In United States District Court for the District of Columbia

[Title omitted]

Affidavit in Support of Application for Leave to Proceed Without Prepayment of Costs—Filed November 13, 1957

I, Cecil Jones, being first duly sworn according to law, depose and say that I am the defendant in the above-entitled cause, and, in support of my application for leave

to proceed in said cause without being required to prepay fees or costs, state as follows:

1. That I am a citizen of the United States.
2. That because of my poverty I am unable to pay the costs of said suit or action.
3. That I am unable to give security for the same.
4. That I believe I am entitled to the redress I seek in said suit or action.
5. That the nature of my cause of action is briefly stated as follows:

Cecil Jones.

Subscribed and sworn to before me this 13th day of November, 1957.

——— ———, Notary Public, D. C.

Let the defendant proceed without prepayment of costs.

Edward A. Tamm, Judge.

[fol. 20] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Title omitted]

MOTION TO SUPPRESS—Filed November 26, 1957

Comes now the defendant, through counsel, and moves the Court to suppress the evidence obtained at 1436 Meridian Place, N.W., Washington, D. C., August 21, 1957, and which is the subject matter of the instant indictment.

1. The United States Commissioner acting upon an affidavit bearing signature of one Thomas Didone, Jr., Police officer, Narcotic Squad, issued the search warrant in this cause.

2. The affidavit reveals upon the face thereof that affiant had no personal knowledge that grounds existed for the issuance of a search warrant.

3. The affidavit reveals upon the face thereof that the United States Commissioner was not in receipt of information from any person who had personal knowledge that grounds for the issuance of a search warrant existed.

4. The affidavit reveals upon the face thereof that some unidentified source of alleged information had transmitted to Officer Didone the suspicions upon which the search warrant issued.

5. The affidavit reveals upon the face thereof that the alleged source of information was not interrogated by nor in the presence of the United States Commissioner.

The warrant issued contrary to law; it has no standing in law; and the contraband seized thereunder may not legally be introduced into evidence as proof that the defendant committed the offense against him.

T. Emmett McKenzie, 412 Fifth Street, N.W.,
Counsel for defendant.

[fol. 21] I certify that the statements contained in this motion are true.

Cecil Jones.

Service acknowledged for the United States of America this 26th day of November, 1957.

Oliver Gasch, U.S. Attorney for the District of Columbia.

Amended to read:

Affiant present in premises concerned on date in question as invitee or guest.

T. Emmett McKenzie.

[fol. 22] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Title omitted]

ORDER DENYING MOTION TO DISMISS AND MOTION FOR BILL OF PARTICULARS—December 13, 1957

On this 13th day of December, 1957, came the attorney of the United States; the defendant in proper person and by his attorney, T. Emmett McKenzie, Esquire; whereupon the defendant's motion to dismiss the indictment, coming on to be heard, is by the Court denied; and thereupon the defendant's motion for bill of particulars coming on to be heard, is by the Court denied without prejudice.

The defendant's motion to suppress evidence heard in part and continued for one week.

The defendant is remanded to the District of Columbia Jail.

By direction of:

Bolitha J. Laws, Presiding Judge, Criminal Court # Assignment. Harry M. Hull, Clerk.

Present: United States Attorney, By Alexander Stevas, Assistant United States Attorney, D. Spatzer, Official Reporter.

By Paul A. Roser, Deputy Clerk.

[fol. 23] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Title omitted]

ORDER DENYING MOTION TO SUPPRESS—December 20, 1957

On this 20th day of December 1957, came the attorney of the United States; the defendant in proper person and

by his attorney, T. Emmett McKenzie, Esquire; whereupon the defendant's motion to suppress, heretofore argued in part on the 13th day of December, 1957, coming on to be heard, after argument by counsel, is by the Court denied.

The defendant is remanded to the District of Columbia Jail.

By direction of:

Bolitha J. Laws, Presiding Judge, Criminal Court #Assignment, Harry M. Hull, Clerk.

Present: United States Attorney, By Alexander Stevas, Assistant United States Attorney, D. Spatzer, Official Reporter.

By Hugh E. Kline, Deputy Clerk.

[fol. 24] [File endosrement omitted]

IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Title omitted]

GOVERNMENT'S OPPOSITION TO DEFENDANT'S MEMORANDUM RE STANDING OF MOTION TO SUPPRESS—Filed December 20, 1957

Comes now Oliver Gasch, the United States Attorney in and for the District of Columbia and represents unto this Court the following:

1. The defendant does not claim ownership of the evidence seized in the instant case nor does he claim to have an interest in the premises searched. On the contrary the defendant contends that at most he was a guest or invitee and specifically disclaims ownership of the property.

2. The law in the District of Columbia is clear that where one is a guest and therefore does not claim evidence seized that such individual's personal rights are not violated and no standing exists to contend the entry and seizure were unlawful. Gaskins v. United States 95 App

D.C. 34, 218 F2d 47 decided January 6, 1955; Jeffers v. United States, 88 App D.C. 58 affirmed 342 U.S. 48 (1951); Washington v. United States 92 App D.C. 31, 202 F2d 214, cert. den. 345 U.S. 956.

As recently as May 29, 1957, the Court of Appeals for the District of Columbia stated in the case of Accardo v. United States that:

> "Clearly, exclusion of evidence seized under the circumstances described here may be permitted only to one who claims ownership in or right to possession of the property seized.
>
> "Moreover, we have expressly held that one who is merely a guest in an apartment said to have been illegally entered and in which no interest is claimed, lacks the requisite standing . . ."

The Jeffers decision *supra*, cited by the defense was a narcotic case in which the defendant, as stated by the Supreme Court at Pages 50 and 54 of their opinion, *claimed ownership of the narcotics seized.* It being his property, for the purpose of the exclusionary rule, he was entitled on motion to have it suppressed as evidence on his trial.

[fol. 25] Wherefore, the Government respectfully represents that the defendant is not entitled to have this Court consider his motion to suppress inasmuch as he lacks the requisite standing to be heard in this matter.

Oliver Gasch, United States Attorney, Alexander L. Stevas, Assistant United States Attorney.

Certificate of Service [Omitted in printing]

[fol. 26] IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

UNITED STATES COMMISSIONER, DISTRICT OF COLUMBIA

Received August 23, 1957, Harry M. Hull, Clerk

RECORD OF PROCEEDINGS—MISCELLANEOUS

Filed January 31, 1958

Before James F. Splain, U.S. Court House, Wash. 1, D. C.

Harry M. Hull, Clerk

This form should be used to record proceedings for which Forms AO 100 and AO 101 are not adapted, such as applications for search warrants, extradition proceedings, depositions in civil cases, proceedings for the release of poor convicts, references in civil or admiralty cases, attachments and subsequent hearings in internal revenue matters, proceedings to settle or certify nonpayment of seamen's wages, civil rights proceedings, detentions of witnesses on removal proceedings in connection with criminal proceedings, if not included in Form AO 100, etc. A separate page should be used for each proceeding, showing the title of the case, its nature, and the date and nature of each step taken.

Commissioner's Docket No. 4, Case No. 1802

Search 1436 Meridian Place, N.W., Apt. 36 including spaces around window.

Occupant: Cecil Jones and Earline Richardson.

Violation T. 26 U. S. Code, Section 4704a

1957

August 21st Search Warrant issued to Chief of Police, D. C., or any other person authorized to serve same upon the formal written application of (affidavits) of Det. Narc. Sqd., MPDC Thomas Didone, Jr.

August 22nd Search Warrant returned by Det. Thomas Didone, Jr. of the Narc. Squad, MPDC. Seizure on return attached hereto. Papers sent to District Court.

(See Case Nos. 1804)

[fol. 27] Certified to be a correct transcript of Docket Entries.

Dated August 23rd, 1957.

James F. Splain, United States Commissioner.

[fol. 28] [File endorsement omitted]

[fol. 29] IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Criminal Action No. 1022-57

UNITED STATES OF AMERICA

v.

CECIL JONES, Defendant

Transcript of hearing—Friday, December 13, 1957

Washington, D. C.

The above-entitled cause came on for hearing before the Hon. Bolitha J. Laws, Chief Judge of the Court, at 12:00 o'clock noon, on the following motions:

Motion to suppress, Motion for bill of particulars, Motion to dismiss the indictment.

APPEARANCES:

Alexander Stevas, Esq., Assistant U.S. Attorney, for the Government.

T. Emmett McKenzie, Esq., for the Defendant.

[fol. 30] PROCEEDINGS

The Clerk: The case of Cecil Jones.

Mr. McKenzie: I was of the opinion this thing wasn't going to come up here today and I don't even have a file with me. I wonder if Mr. Stevas would be kind enough to let me see a copy of the motion so I will have some idea of what I did.

Mr. Stevas: I believe there are two other motions, I believe, filed pro se by the defendant in addition to Mr. McKenzie's motion.

Mr. McKenzie: All motions are my motions now. I am in charge of this situation for the defendant.

The Court: You have a motion to suppress, motion for bill of particulars and—what is that?

Mr. Stevas: And motion to dismiss the indictment.

Mr. McKenzie: The motion for bill of particulars, sir, if you wish to concern yourself with that, seems to indicate.

that there are persons who have knowledge of this matter who may have testified before the grand jury and who possibly will testify before the petit jury.

The defendant seeks to obtain copies of statements made by those persons.

Since the Jenks case, you all realize, there has been a special statute passed which provides that we may not have [fol. 31] those statements in advance of trial, but if one of those witnesses is called, we may ask for his statement before we cross examine him. That is a correct statement of the law, is it not?

Mr. Stevas: That is correct, if Your Honor please.

Mr. McKenzie: So at this stage of the case, I think it is not proper to press for the grant of that motion because it is not justified in law.

The Court: That is, the motion for bill of particulars.

Mr. McKenzie: Yes.

DENIAL OF MOTION FOR BILL OF PARTICULARS, ETC.

The Court: All right, I will deny that without prejudice to renewing at the time of trial.

Mr. McKenzie: Now the motion to dismiss the indictment.

In my opinion, I do not sympathize with the draftsman of that motion and his ideas of law and mine are far apart. I don't even attempt to support that motion. I think there are no grounds here to dismiss the indictment on the face of it.

OVERRULING OF MOTION TO DISMISS THE INDICTMENT

The Court: Let me read the indictment.

That is in the language of the statute.

That motion is overruled.

COLLOQUY

Mr. Stevas: If Your Honor please, there remains, [fol. 32] then, the motion to suppress, and I would like to be heard preliminarily before Your Honor entertains that motion, and my reason for that is this.

If Your Honor please, the defendant nowhere in his motion to suppress claims ownership of the property which

was seized, in this case consisting of a narcotic drug and narcotic paraphernalia. As a matter of fact, in his motion to dismiss the indictment, he specifically disclaims ownership of the premises themselves. So it is the Government's position, under our opinions in our Court of Appeals, that he has no standing at this time to move to suppress, since he claims neither ownership of the things seized nor an interest in the premises themselves, and unless and until he amends his motion to suppress to include that, the Government is opposed to the Court entertaining the motion, because he hasn't alleged sufficient grounds to come before this Court.

Mr. McKenzie: We would ask leave to amend the motion at this time orally to the effect that at the time of the search and seizure he was rightfully in these premises as an invitee or guest.

The Court: Well, I will let you amend it, but write in your amendment, will you.

Mr. Stevas: The Government also requires, if Your Honor please, or requests the Court to equire that this be by [fol. 33] the defendant, because the courts have held that we can use in evidence against him such a statement. I would ask that he sign it. The present motion, I believe, is filed only by counsel. There is no affidavit attached to it.

The Court: He can allege it, but if he doesn't call him as a witness—my idea is when he alleges it, I will have to wait to see what he puts in evidence.

Mr. Stevas: Yes, if Your Honor please. I believe the defendant has on the original of this motion certified the statements contained in this motion to be true, and I presume that that certification will cover the amendment which reads that the affiant was present in premises concerned on date in question as invitee or guests. However, even that is not sufficient. Merely being an invitee in the premises does not give him standing to move to suppress evidence found on the premises themselves. These items were not taken from the person of the defendant. In order for him to have standing to move to suppress, he either has to allege ownership of the items seized or an interest in the premises themselves, that is, as lessee, owner or occupant; guest alone is not sufficient.

The Court: I think that is right, isn't it?

Mr. McKenzie: No, Your Honor. I think this, that under the MacDonald case, certainly a guest——

The Court: What case?

[fol. 34] Mr. McKenzie: MacDonald v. United States. It came from this court to the Supreme Court of the United States. Where this fellow was a guest in a place, where they raided a numbers place. But having stated this much, this my contention, that the manner and means of his presence in that apartment or room, whatever it is, can be definitely established. I mean, he might have been a week-end guest or he might have had use of the premises or the key might have been turned over to him, and I think that is the fact of the matter, that he was given permission to use this particular premise over a period of time, and from time to time did so and was there that day under those circumstances, the real owner being absent.

The Court: I think I will take the evidence, then we'll know where we are. We had that kind of problem in that narcotic case up there—what is the name of that hotel?—the Dunbar Hotel. He had access to the premises.

Mr. McKenzie: Well, I had that case. It went to the Supreme Court.

The Court: He claimed it was his aunt's or something. I had the MacDonald case myself. All right, let's see what record you——

Mr. McKenzie: We can do this, sir. I will put this young man on the witness stand for the sole purpose of stating how he was in that place, what kind of a guest or [fol. 35] invitee he was, to see if he has standing.

The Court: You can call him for any purpose you want.

Mr. McKenzie: But I don't want to subject him to cross examination to indicate guilt or innocence, because I may not put him in the case in chief.

The Court: I think you are entitled to do that.

Thereupon CECIL JONES, the defendant herein, was called as a witness in his own behalf, and after being duly sworn, was examined and testified as follows:

Direct examination.

By Mr. McKenzie:

Q. Now, sir, is your name Cecil Jones?

A. Yes, sir.

Q. Calling your attention to the premises in this town 1436 Meridian Place, Northwest, have you been at that premises sometime or other?

A. Yes, I have been there before.

Q. Calling your attention to August 20, 1957, the week of August 20th, were you in 1436 Meridian Place, in that building or room or apartment, whatever it is?

A. I went there that day.

[fol. 36] How did you get there?

A. In a car.

Q. Whose place was it? Did you rent it? Did you pay the rent or own it or anything?

A. It was Evans Arthur's place.

Q. Was he a friend of yours?

A. Yes, sir.

Q. Did he give you the use of that apartment in any manner?

A. He did.

Q. Did he give you a key?

A. He let me have a key.

Q. And when you went there on this particular day, did you have a key to let yourself in that you obtained from this man that you are talking about?

A. I did.

Mr. McKenzie: I have no purpose in going further with that proposition, Your Honor. I think that establishes the situation.

Cross-examination.

By Mr. Stevas:

Q. Is it not a fact, sir, that you took over those premises from Evans Arthur?

A. No, sir, I did not.

[fol. 37] Is it not a fact, sir, that you had your clothing and your personal property in these premises on the date that you were arrested there?

A. I had a suit there.

Q. One suit?

A. Yes, sir.

Q. And your shirt?

A. A suit and a shirt.

Q. And other clothing you had there, shoes and stockings?

A. That I had on. I didn't have anything on.

Q. Is it not a fact that you were living in those premises?

A. I wouldn't say I was living there, because it is not my home address. I wasn't living there.

Q. What was your home address on August 20, 1957, the date you were arrested?

A. 811 - 9th Street, Northeast.

Q. And you were renting from whom?

Mr. McKenzie: Just a minute. I object to any further cross examination on this line for this purpose. The question to be decided here and now is whether or not he was in this particular place under the circumstances outlined in Jeffers v. United States. We have established that fact. It doesn't make any difference where the other [fol. 38] home was, from whom he rented or from whom he paid. It is just a question: has he now produced sufficient evidence to give him status to maintain that, and he has done that and nothing can be done from now on will change that situation.

The Court: I think the nature of his renting of any property is competent, where he stayed. Did you pay rent where you were staying on 9th Street?

The Witness: Yes, sir.

The Court: Did you pay anything whatever for 1436 Meridian Place——

The Witness: No, sir.

The Court: —or have any arrangement to pay?

The Witness: No, Your Honor.

The Court: He was letting you stay there as a friend?

The Witness: Yes, sir. He gave me the use of the place.

The Court: All right.

By Mr. Stevas:

Q. Is it your mother and father that live on 9th Street?

A. Yes, sir.

Q. Do you deny that you slept or sleep at this Meridian address?

A. I don't deny that I didn't sleep there maybe a night.

Q. By whose authority did you sleep there at night?

[fol. 39] A. Evans Arthur's authority.

Q. Was he there, too, when you were sleeping there?

A. No, sir.

Q. Where was he?

A. In Philadelphia.

Q. How long has he been away from the Meridian address and up in Philadelphia?

A. I would say somewhere about five days, I would say.

Q. Do you deny that you paid the rent for these premises?

A. Yes.

Mr. McKenzie: Just a minute. This question, do you deny—he hasn't denied anything. Put the question to him properly: did he or did he not?

By Mr. Stevas:

Q. Do you deny you are the same person——

Mr. McKenzie: I object to the question the way it is asked.

By Mr. Stevas:

Q. Do you deny you are the same Cecil Jones who was convicted in this court on May 28, 1948 for receiving stolen property?

Mr. McKenzie: Just a minute. I object to that. What possible bearing does that have on this proposition?

The Court: It goes to his credibility.

[fol. 40] Mr. McKenzie: Do you really believe that the statement that he got a key from this fellow is untrue?

The Court: I think we can save time by letting him answer it.

By Mr. Stevas:

Q. Are you that same person?

A. Am I the same person that what, sir?

Q. That was convicted here in the United States District Court for the District of Columbia and sentenced on May 28, 1948 for receiving stolen property.

A. I was convicted for receiving stolen property.

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Stevas: I have no other questions at this time.

Mr. McKenzie: I have no other questions.

Mr. Stevas: As our Court of Appeals has pointed out, the defendant may be putting himself on the horns of a dilemma, but I do not think that merely being a guest in the premises gives him the right to make a motion to suppress evidence which was not taken from his person but taken from the premises, where he does not claim that he owns the evidence itself which was seized, and, if Your Honor pleases, that was passed upon in Gibson and Kelly, and the specific point has been passed upon in our Court of Appeals very recently.

The Court: I think that is correct, Mr. McKenzie, have you any authority the other way?

[fol. 41] Mr. McKenzie: Well, as I said before, I didn't expect this matter was going to come here today, and I want to say this to you. I filed this motion. Now I have received no objection of any kind from the office of the District Attorney. He doesn't advise me until two minutes ago that he believes the grounds for the motion are not legally competent and proper. I am entitled to be advised of that fact in advance so that I can prepare myself to present the situation to you.

The Court: I think that is a natural point you could make, but out of courtesy, if you want a few days, I will let you have it.

Mr. McKenzie: I mean, I am appointed to represent this fellow and the tougher it gets for him, the better it is for me, because if it gets tough enough, I will be all right in the Court of Appeals.

Mr. Stevas: I have no objection to counsel having a few days, but I want this record to show that the last time

when this motion was coming up, Mr. McKenzie knew the Government was opposing it, because I told him I would need a continuance to have the witness here.

The Court: You have a right to oppose it on that ground.

Mr. McKenzie: I want the record to show this, that never in your lifetime did you say before this morning what the [fol. 42] opposition was going to be. You said you didn't have a witness.

The Court: Well, gentlemen, address your remarks to me. How much time do you want? I will give you three days. Is that enough?

Mr. McKenzie: Some day early next week is all right with me.

The Court: All right, get it in by Wednesday, will you.

Mr. McKenzie: Yes.

The Court: Anything you want to write on it. I think he is right about it, but I am not going to rule on it until you have a chance to answer it.

Mr. McKenzie: Very well, sir.

The Court: I will continue this hearing until next Friday if you need to argue it. You don't need to argue it further orally unless you want to, but if you are going to have any authorities, put it in by Wednesday so he can have two days to reply, will you.

Mr. Stevas: Will that be Thursday or Friday? I understand the court is going in recess next week.

The Court: We'll be here Friday. I hadn't heard anything about a recess.

Mr. Stevas: I just hadn't had anything set for trial. I didn't know.

[fol. 43] The Court: That is a little different. You have a whole lot of motions, I think.

(Whereupon, at 12:15 p.m., the hearing in the above-entitled cause was continued to Friday, December 20, 1957.)

Reporter's Certificate to foregoing transcript omitted in printing.

[fols. 44-45] IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Title omitted]

Criminal Action No. 1022-57

Washington, D. C.

TRANSCRIPT OF HEARING—Friday, December 20, 1957

A motion to suppress in the above-entitled cause came on for hearing before the Hon. Bolitha J. Laws, Chief Judge of the Court, at 11:20 a. m.

APPEARANCES:

Alexander Stevas, Esq., Assistant U.S. Attorney, for the Government.

T. Emmett McKenzie, Esq., for the defendant.

[fol. 46] PROCEEDINGS

The Clerk: Case of Cecil Jones.

Mr. Stevas: If Your Honor please, I have tendered to the clerk the copy of Mr. McKenzie's points and authorities, since the original is not in the file, and attached to that is the Government's points and authorities to the contrary of Mr. McKenzie's position.

The Court: All right.

ARGUMENT IN SUPPORT OF MOTION

Mr. McKenzie: Your Honor, I see no purpose in any lengthy discussion about this matter.

The defendant takes the position that he falls within the rules established by the Supreme Court in the Jeffers case. In that case the narcotics were stored in a hotel room which was maintained and paid for by relatives of the defendant. The chief point of opposition is as set forth on Page 63 of the Supreme Court's opinion, which I have copied on Page 1 of my memorandum, in which the court said:

"The Government argues that the search did not invade respondent's privacy, and that he, therefore,

lacked the necessary standing to suppress the evidence seized."

Mr. Stevas projects his opposition upon the fact we don't [fol. 47] claim ownership of the contraband. I submit that the violation I am complaining about is a violation of his right to privacy which is protected by constitutional amendment. I have nothing further to add. I am prepared to submit the matter on that proposition.

ARGUMENT IN OPPOSITION TO MOTION

Mr. Stevas: If Your Honor please, for the purpose of the record, I have the Jeffers case here. In that case it was not Jeffers' premises which were invaded. I believe it was the premises of his two aunts. I think Mr. McKenzie argued this in the Supreme Court.

Very clearly, the Supreme Court points out on Page 50 that the respondent at the time he was arrested claimed ownership of the narcotics seized. They state in their finding and holding in this case that, it being his property, that is, the narcotics which were seized in the premises, it being his property, for the purpose of exclusionary rule, he was entitled on motion to have it suppressed as evidence at the trial, which is completely different from the contention of the petitioner here, because he disclaims ownership of the property.

Now, in the Jeffers case, the defendant did not have an interest in the premises themselves. He was merely a guest or invitee, but because he claimed ownership of the property, he had standing.

[fol. 48] Very recently, as I set forth in my opposition, our Court of Appeals in the Accardo case, which was decided on May 29th of this year, had occasion to refer once again to the old Mary Gaskins case decided in January of 1955. That case was very close to the one here, if Your Honor please.

In the Gaskins case, she was the wife of a man for whom the police had an arrest warrant. There were narcotics seized from her after the officers had gained forcible entrance into the apartment of her husband.

Now, in this particular case, in the Gaskins case, the appellant, the Court of Appeals stated, in view of the

position she took at the trial level, was merely a guest in the apartment which she claims was illegally entered. She did not claim to have any interest in the premises themselves other than being a guest. She specifically disclaimed ownership of the drugs, which she contends were illegally seized. In this case the Court of Appeals stated that since her personal rights were not violated, she has no standing to contend that the entry and subsequent seizure were unlawful. Now they cite the Jeffers case, the very case Mr. McKenzie is relying upon, and also the Washington case.

In the Washington case, if Your Honor please, which was decided in January of 1953, the Court of Appeals stated that except for Washington—and this was a gambling [fol. 49] case; they had executed a search warrant, as in our case—they said that only Washington had any standing, because all the other persons who were in that room, and were trying to attack the validity of the search warrant, made no claim to ownership of the property or possession of the property seized by the police or to an interest in the premises searched. So they had no standing to move, but Washington did, because he claimed possession of the premises.

Now in the Accardo case, if Your Honor please, that was a pretrial motion to suppress certain articles which were seized, and Accardo disclaimed an interest in the property. Here, again, we had suitcases and there was contraband in the suitcases, as in the Jeffers case, the distinction being Accardo did not claim ownership of the contraband, expressly denying it, Jeffers claimed the contraband. Accardo, as a mater of fact, testified, as did this defendant last Friday, that he was not living at the Rigby apartment, that he had stayed there on occasions, that he did not pay any rent. That is exactly the testimony of this defendant by my interrogation last week, when you heard him on the witness stand in support of his position that he had standing.

The Court of Appeals for this District quoted his, if Your Honor please: "Men may wince at admitting they were the owners or in possession of contraband property, [fol. 50] and they may wish at once to secure the remedies of a possessor and avoid the perils of the part, but

equivocation will not serve. If they come as victims, they must take on that role with enough detail to cast them without question. The petitioners at the bar shrank from that predicament, but they were obliged to choose one horn of the dilemma."

Now, if Your Honor please, they stated in this Accardo case on Page 4—and this is a slip opinion; I don't think it has been officially reported yet:

> "Moreover, we have expressly held that one who is merely a guest in an apartment said to have been illegally entered and in which no interest is claimed, lacks the requisite standing. Since appellant's personal rights were not violated, she has no standing to contend the entry and subsequent seizure were unlawful," and that is the instance where they cite the Gaskins case.

In view of the defendant's position, he having not chose to put himself on the horn of the dilemma, not casting himself as the victim, the Government says he has no standing.

Mr. McKenzie: I don't have any conversation to dis- [fol. 51] turb the proposition of the right of his privacy, which was invaded, as far as he was concerned, that he is guaranteed. I see no purpose in protracting this discussion.

RULING OF THE COURT

The Court: I think the cases fall within the decisions of the Court of Appeals, as I understand them, and the motion to suppress will have to be denied.

Reporters Certificate to foregoing transcript omitted in printing.

[fols. 52-53] IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Title omitted]

Criminal Case No. 1022-57

Washington, D. C.

TRANSCRIPT OF HEARING—January 31, 1958

The above-entitled matter came on for hearing before The Honorable Alexander Holtzoff and a jury.

APPEARANCES:

For the Government: Mr. Alexander L. Stevas.
For the Defendant: Mr. T. Emmett McKenzie.

[fol. 54] (At the bench:)

Mr. McKenzie: In this case the defendant, Cecil Jones, sua sponte, has filed a motion for a Bill of Particulars and a Motion to Dismiss the indictment. I have advised him from—if the manner utilized in the search warrant—if all of it fits, we need to try the case. I have advised him of the parts of the case that there was no use, but before we got here I filed a Motion to Suppress which was denied at that time. I will again ask you to suppress the use of the codicil.

The Court: Well the Court observes that the Motion to Dismiss and the Motion for a Bill of Particulars were denied by Judge Laws on December 13, 1957. The Motion to Suppress was heard, argued, and denied by Judge Laws on December 20, 1957. It is my view of the law that the decision on the Motion to Suppress is binding on the trial judge so I cannot review the matter. However, the defendant's rights are protected because if the defendant be convicted and desires to appeal, he can assign as error on the appeal, the denial of the Motion to Suppress.

Mr. McKenzie: That is all I have.

(End of bench conference:)

[fol. 55] PROCEEDINGS

(Following the selection of a jury and opening statements by counsel, the following proceedings were had in open Court:)

Mr. Stevas: Will you call Officer Didone as the first witness.

Whereupon THOMAS DIDONE, JR., was called as a witness on behalf of the Government and, having been first duly sworn, was examined and testified as follows:

Mr. Stevas: Now Officer Didone I am going to ask you to keep your voice up as I am doing so the last juror can hear, the defendant and, of course, the Court.

Direct examination.

By Mr. Stevas:

Q. For the record would you give us your full name and I will ask you to spell it for the reporter.

A. Thomas Didone, Jr. D i d o n e.

Q. And you are employed by whom?

A. By the Metropolitan Police Department.

Q. In what capacity?

A. As a detective on the Narcotic Squad.

Q. How long have you been employed with the Narcotic Squad?

A. Since November 1952.

[fol. 56] Q. Directing your attention to the month of August 1957, now the dates August 20 and 21st were you so employed at that time?

A. I was.

Q. Did you have an occasion, sir, on or about those dates to go to the vicinity of the 1400 block of Meridian Place, Northwest?

A. On August 21, 1957, I did, sir.

Q. Prior to going to those premises had you been any where else in connection with your trip?

A. Yes sir, on August 20th.

The Court: Officer, if you would speak a little louder so everyone can hear you.

Mr. McKenzie: Your Honor, may I approach the bench on a collateral matter?

The Court: Yes, indeed.

(At the bench:)

Mr. McKenzie: A clerk from the Municipal Court has brought these papers here which indicate a disposition of cases involving other persons arrested at that same time and place. The disposition of the case shows guilty of some phase of the Narcotic Law. I want to attempt to use these documents in behalf of my defendant and I have the clerk of the Municipal Court here and I wonder if we could stipulate he brought these documents and that they are official.

[fol. 57] The Court: Oh, yes, of course. You can inform the representative of the Municipal Court he can leave these papers in the custody of the clerk.

Mr. McKenzie: Very well.

(Following bench conference:)

The Court: You may proceed, Mr. Stevas.

By Mr. Stevas:

Q. Now Officer Didone, I believe my last question prior to going to the vicinity of the Meridian Place, Northwest, had you been anywhere else in connection with this case?

A. I was.

Q. Where was that place you went?

A. That was in the hallway outside the Narcotic Squad Office. In the hallway outside the Narcotic Office I went to speak to a person who gave me some information.

Q. And as a result of the information you received did you go anywhere?

A. Yes, sir, I went to the United States Commissioner's Office on August 20.

Q. That is here in this building?

A. Yes, sir.

Q. What did you do there?

A. I obtained a search warrant for 1436 Meridian Place, Apartment 36.

[fol. 58] Q. Is that here in the District of Columbia?

A. Yes, sir, it is.

Q. Now did there come a time when you executed that United States Commissioner's search warrant for these premises?

A. Yes, sir.

Q. About what time was this that you went to those premises?

A. About 5:00 P. M. on August 21, 1957.

Q. Can you tell me if anyone was with you when you went to those premises?

A. When I went to the apartment door there was Officer Fogle, Officer Ferguson, and Officer Bonaparte had gone to the 1436 Meridian Place address but he was outside of the building.

The Court: Do you have the search warrant?

Mr. Stevas: I believe it was in the file when this case was before Judge Laws.

The Court: It is not necessary to offer it into evidence but I merely wanted to see it. I will ask the clerk to send for it.

Mr. Stevas: I do not have the number of it.

The Court: What is the number of the place again?

The Witness: 1436 Meridian Place, Apartment 36.

By Mr. Stevas:

Q. What section of the city?

A. Northwest.

[fol. 59] Q. Now, sir, Officer Bonaparte was stationed where?

A. Outside the building.

Q. Any particular place outside the building?

A. In a position where he would be able to look at the window of apartment 36.

Q. When you went inside the building?

Mr. Stevas: If your Honor, please, there is a copy here which Mr. McKenzie happened to have bearing the original——

The Court: The original should be in this file.

By Mr. Stevas:

Q. When you went inside the premises, Officer Didone, will you tell His Honor and the ladies and gentlemen of the

jury, step by step, your activities after you went inside the building?

A. Do you mean the apartment of the building?

Q. The building itself?

A. We went up to the fourth, third floor where I knocked on the door. There was a door of wood and it has a frosted glass plate on it so I knocked on the door and I observed an image shadow on the other side of the door. I remained moot to the calling of "Whose there" and I knocked again and I remained moot when the man inside said "Whose there" and shortly thereafter I saw the shadow fade away and walk away from the door and I heard voices which I recognized as the defendant called somewhere and said "Call the janitor, there is someone [fol. 60] at my door and he won't go away. We remained moot and then Officer Fogle went downstairs and left us. Shortly thereafter he returned to where we were in front of apartment 36 and he had a janitor with him. I identified myself to the janitor and told him we had a search warrant for the premises. The janitor knocked on the door and again the voice said: "Whose there"? I remained moot and the janitor said: "Janitor." The door was then opened three or four inches and he had a night chain attached on the inside. I had my wallet open with identification exposed and I placed this inside the door saying I had a search warrant for the premises. This defendant who had opened the door and was standing directly behind the partially opened door there, tore and went straight back to the bathroom. Then seeing he was refusing me entrance I placed my hand on the chain and pulled and the night chain slipped loose. I dropped my wallet and credentials but I went directly to the bathroom and told this defendant we had a search warrant. I showed him the search warrant for the premises. The other officers followed behind me. There is a bathroom to the apartment, there is one room to the right of the bathroom and directly between the door and the bathroom there is a small foyer. As we entered, in the other room was Cicero Martin, whom I knew to be a drug addict; there was James Daniels, whom I knew to be a drug addict; there was John Palmer, whom I knew to be a drug addict; and Earl Richards, whom [fol. 61] I knew to be a drug addict. They were in the small

room to the right. As we proceeded to search the premises Ferguson was in the bathroom and when he reached up into an awning there was a bird's nest on the left hand side. This was on the outside of the window. The search warrant that I obtained from the United States Commissioner's Office was for apartment 36 including the window space, this was included in the search warrant. Ferguson recovered from this bird's nest——

Q. In your presence?

A. In my presence, a small package which contained needles, a syringe, and a bottle top cooker. Ferguson immediately turned this over to me and stepped aside and I proceeded to look in the bird's nest. And as I moved my hand about the bird's nest there fell from the nest and landed on the window sill, a space of about two feet or so, I recovered this one capsule and kept it in my possession. Subsequently, the defendant, Cecil Jones, was brought to the bathroom window and Bonaparte, who was standing directly below on the ground by the side of the building, and I asked Bonaparte in the presence of the defendant, Cecil Jones, if this was the man he had seen at the window under the awning. Bonaparte, in the presence of Cecil Jones, identified Jones as the man he had seen and as the man who was yelled to him to call the janitor. Upon questioning the defendant about the paraphernalia—the needle and syringe—he said some of it was his but [fol. 62] not all of it. He admitted the capsule of white powder was his. The defendant was then charged with the violation of the Harrison Narcotic Act along with Earline Richardson, who was a co-occupant of the apartment. Palmer, Daniels, and Martin were charged with the Uniform Narcotic Act vagrancy, being in a premises where narcotic drugs are kept. They were subsequently transported to Headquarters and they were charged on the book and processed.

Q. All you have testified to so far took place in the District of Columbia?

A. Yes, sir.

Q. Officer Didone, with respect to the capsule which you recovered what, if anything, did you do with the capsule?

A. I laid it before a preliminary field test on a white

powder which indicated by a positive color reaction the presence of the narcotics of the opium group.

Q. What, if anything, did you then do with the other items? The other items you recovered?

A. The capsule was placed in a small cream colored envelope which was marked for future identification. The paraphernalia which was wrapped in a piece of paper and sealed and was also marked for future identification. I placed these in a sealed envelope and kept them in the safe until I, on September 9, when I delivered them to the United States Chemist, Doctor Butler.

Mr. Stevas: May I have this marked as Government Exhibit 1 for Identification purposes?

[fol. 63] The Clerk: Government Exhibit 1 for Identification.

(Document marked Govt Exhibit 1 for Identification.)

By Mr. Stevas:

Q. I ask you to look at that and I will ask you after you look at that if you are able to identify Government Exhibit 1 for Identification?

A. Yes, sir, I can identify Government Exhibit 1.

Q. How?

A. By the handwriting I placed on this large cream colored envelope.

Q. What do you identify Government Exhibit 1 for Identification to be?

A. It is the large envelope which I placed the paraphernalia and the capsule in that were recovered at apartment 36 at 1436 Meridian Place. It was placed in this envelope which opened this way and I personally placed these seals on it and at this time the envelope was in tact.

Q. You placed it on there?

A. At the time I delivered it to the chemist it was in tact.

Q. Would you withdraw the contents of Government Exhibit 1 for Identification at this time?

Mr. Stevas: May I have this marked as Government Exhibits 1a and 1b for Identification?

Deputy Clerk: Government Exhibit 1a and Government Exhibit 1b for Identification.

(Document marked Govt Exhibits 1a and 1b for Identification.)

[fol. 64] By Mr. Stevas:

Q. I hand you what has been marked Government Exhibit 1a for Identification and Government Exhibit 1b for Identification, and I will ask you first to examine Government Exhibit 1a and having examined that, are you able to identify Government Exhibit 1a for Identification?

A. Yes, sir. This is the small cream colored envelope into which I placed the one capsule containing one grain of heroin.

Q. How are you able to identify that?

A. I identify it by the writing I placed on it and by my initials. After I placed the capsule into it I sealed this small envelope. I also, placed the paraphernalia, after it was marked, into this larger cream colored envelope which I also marked and I find my handwriting and initials on it and I also sealed this.

Q. What, if anything, did you do with Government Exhibit 1a, containing the capsule and Government Exhibit 1b, containing the paraphernalia?

A. After I placed them inside the envelopes and sealed them, I placed both of these envelopes into Government Exhibit 1, which I also marked and sealed.

Q. Is that the item you delivered to the United States Chemist?

A. Yes, sir, that is the item.

Q. Anyway you did withdraw the contents of Govern-[fol. 65] ment Exhibit 1a at this time and can you tell us, sir, what the contents of Government Exhibit 1a were when you first saw that?

A. It is a small capsule which contains a quantity of white powder. It is the capsule which fell from the bird's nest of apartment 36 of 1436 Meridian Place and the said capsule is the one that I did recover.

Q. With respect to the contents of Government Exhibit 1b, can you identify those?

A. Government Exhibit 1b I identify by the marks I have placed on it. It is the paraphernalia which Officer Ferguson recovered from the bird's nest of the window of

apartment 36 of 1436 Meridian Place and said paraphernalia is the one he turned over to me.

Q. This was done in your presence?

A. Yes, sir.

Q. Can you, for the benefit of the jury and His Honor, tell me what you are holding in your hand? What those items are?

A. I am holding what is called adequate paraphernalia and the hooks.

The Court: Called what?

The Witness: They call it hooks. It consists of a glass bottle and what happens is this bottle top cooker being what is called bottle top cooker, it is an ordinary bottle [fol. 66] top and has a wad of cotton in it. This here, the small capsule is opened and the white powder is dropped into this bottle top cooker. A small amount of water is placed in there and a match or candle or slow flame is held underneath. The powder dissolves in the water. The person then places this needle on a syringe, the person then draws the solution of white powder and the water into the needle through the cotton padding. After the solution is brought up into this syringe the person places this silk stocking tourniquet, that can be placed on before or after preparing the solution, this is placed on the arm, leg, wrist, or forearm, whichever vein is going to be injected. It is placed on there and hooked around and after it is on and the vein is pronounced the person then places the needle into the vein. As the needle draws blood comes back up into the needle then into the vein and the blood is forced back up into the needle and the tourniquet is loosened and the solution is then pressed into the vein. In my tour of undercover duties of years ago I have seen them inject heroin into their veins.

Q. Did you have an occasion to examine the different people in this particular apartment at the time you went into the apartment with respect to their bodies or any needle marks on the arm? I do not believe the results would be admissible but just the fact that he did do that?

A. Yes, sir.

Mr. Stevas: Your Honor, I have no further questions of the witness at this time.

[fol. 67] Mr. McKenzie: Your Honor, may I now have temporary possession of the search warrant?

The Court: Yes, indeed.

Cross-examination.

By Mr. McKenzie:

Q. Officer Didone, I hand you herewith some papers, the first page I don't ask you to concern yourself with. The second page and the third page I ask you to examine those pages, two and three before I ask the next question.

A. I have examined pages 2 and 3, sir.

Mr. McKenzie: Your Honor, for the record I identify page 2 in this series as an affidavit for a search warrant on a printed form described as AO.106, the third page is a page of ordinary size typing paper and is also an affidavit in support of a search warrant.

Q. Officer Didone, on the first page I ask you to examine that. Does your signature appear there?

A. Yes, sir, I did notice it there.

Q. Did you swear to that paper and sign it on August 21, 1957?

A. On the 20th, sir.

Q. Lobk again at the last line on that document?

A. On the 21st of August is when I got the search warrant; and the 20th of August is when I got the information.

Q. My previous question to you, sir, I ask you if you had signed that paper. I first asked you to examine it and did [fol. 68] you swear to it on August 21, 1957? And you said you signed and swore to it on the 20th. Now was that first statement in error?

A. That was in error, sir.

Q. Now you contend that you signed the second paper on August 20?

A. No, sir, I contend that I received the information.

Q. Very well. So it is a fact that you signed no paper on the 20th?

A. Not on the 20th.

Mr. McKenzie: Your Honor, at this time I would like to have this document identified as Defendant's Exhibit 1 for Identification.

The Court: Very well.

Deputy Clerk: Defendant's Exhibit 1 for Identification.

(Document marked Defendant's Exhibit 1 for Identification.)

By Mr. McKenzie:

Q. Now in the execution of that warrant, sir, when you went to the premises at 1436 Meridian Place, Northwest, did you immediately go inside?

A. The building?

Q. Yes?

A. Yes, sir, when I went there.

Q. What I am driving at, you did not take a post outside? Bonaparte did that?

A. Yes, sir.

Q. Until the time that you entered the apartment you saw [fol. 69] nothing transpire there?

A. Except the shadow behind the frosted glass of the front door.

Q. That was just a shadow moving away from the door wasn't it?

A. That is right.

Mr. McKenzie: May we come to the bench?

The Court: Yes, indeed.

(At the bench:)

Mr. McKenzie: Your Honor, I would like to ask your help on a little matter here. I am convinced that you are going to admit all of this evidence. When it happens and if it is going to be admitted, I want to cross-examine on it, and if I can do it now instead of after, sir, it will save an awful lot of time.

The Court: Very well. It is part of the res gesta. I think it is permissible.

Mr. McKenzie: It seems to me that it is better to do it while I am at it rather than later on.

(Following bench conference:)

By Mr. McKenzie:

Q. Officer Didone, with regard to each and every article, the cooker, needles, syringe, and little pill, did you know

of your personal knowledge from hence they came? Where they were before they got to that apartment?

[fol. 70] A. No, sir.

Q. Did you of your own personal knowledge know who brought them there?

A. No, sir.

Q. Do you know, of your own personal knowledge, how long they had been there before they came into view?

A. No, sir.

Q. With regard to the matter of this bird's nest you spoke of, you were not in a position to see anything that transpired with regard to that bird's nest before you entered?

A. No, sir.

Q. You did recall you heard a voice which you identified as that of the defendant calling to Officer Bonaparte below to seek out the janitor to find out who was trying to get into that apartment? Correct?

A. I heard a voice calling but I don't know who he was calling to. All he said said was: "Call the janitor, there is someone knocking at my door who won't go away."

Q. The janitor did come?

A. Yes, sir.

Q. Do you know the person who appeared with the janitor at the door?

A. Officer Fogle went for him but we didn't known he was the janitor until he appeared.

Q. Did Fogle come up the stairway with this colored man?

[fol. 71] Yes, sir, he did.

Q. Did you have a conversation with him?

A. Yes, sir, I did.

Q. And after that conversation did he knock on the door himself? The janitor?

A. Yes, sir.

Q. What did he say?

A. Janitor.

Q. All right. Now at that time did you say: "I am a police officer and I have a warrant and I want you to open up this place"?

A. Right after he said janitor and the defendant immediately opened the door and I could see the crack

open and the night chain was on. I then identified myself peering in at the crack.

Q. While the janitor was there, either before he knocked or at the time he knocked, did you then say in an under tone: "This is the police and I have a warrant for this place"?

The Court: He said he did that after. I think he has answered the question. He said he did that after the door was opened part way.

Mr. McKenzie: The only trouble we have here, sir, is that standing here a man is looking for a little different kind of answer than you are up there. You are a little more comfortable about this thing than I am.

[fol. 72] The Court: He has given an answer.

By Mr. McKenzie:

Q. You stated the door opened slightly but there was still a night chain on?

A. That is right.

Q. To prevent entrance?

A. That is right, the door opened outwardly.

Q. Now if you still have your wallet there will you take it out and——

A. I had my wallet open like this and the minute the door opened ajar I placed my wallet there. The door opened outwardly not inwardly.

Q. Then what did you do?

A. I identified myself as a police officer and said: I have a search warrant. I recognized the defendant and he immediately turned and went back across the foyer to the bathroom, leaving the door the way it was. I then took hold of the door, pulled it open and the night chain slipped off.

Q. The particular question I asked before you seized the door or looked for a night latch, did you say: I am a police officer with a warrant to search these premises, before or after?

The Court: He said he did it before.

Mr. McKenzie: I object to being curtailed in this manner.

The Witness: No, sir, not before, not before, but [fol. 73] immediately when the door opened.

By Mr. McKenzie:

Q. When you got into these premises were there anyone there but Defendant Jones?

A. Yes, sir.

Q. Was there a person there whose name was Martin?

A. Yes, sir.

Q. And then a person named Palmer?

A. John Arthur Palmer.

Q. A person named Daniels?

Q. Were there any girls there?

A. Earline Richardson and a Catherine Walters.

Q. Now do you know what time that day these persons arrived at that apartment?

A. Not to my personal knowledge.

Q. Do you know whether they were in that apartment before Jones entered the apartment?

A. I was told but not of my personal knowledge, no, sir.

Q. You have no personal knowledge?

A. No, sir.

Q. Do you know that those persons were, each and every one of them were addicts?

A. Again I cannot say of my personal knowledge but from [fol. 74] what I have been told they were.

Q. Now did you arrest those persons?

A. Yes, sir.

Q. Did you subsequently charge them with violation of the Narcotic laws?

A. Various ones, yes, sir.

Q. You charged all but one person, isn't that correct?

A. Earline Richardson and the defendant were charged with violation of the Harrison Narcotic Act. Martin, Palmer, and Daniels were charged with vagrancy. The Walters girl was booked for investigation and later released.

Q. The Walters girl was never charged with any criminal offense was she?

A. No, sir.

The Court: I think that is irrelevant. What happened to other persons in the place, I think is irrelevant.

By Mr. McKenzie:

Q. Now with regard to these other persons, did you make an examination of Martin to determine whether he was an addict?

A. If I recall correctly, I did look over Martin, sir, and did have a conversation with him and I couldn't find very many needle marks on him, if any, if I remember correctly, if my memory is correct his skin was the cleanest of Daniels and Arthur.

Q. And now you have been in this kind of work, engaged [fol. 75] in this type of work for a long time, haven't you?

A. I have.

Q. You are able when you see a man's arm or leg or wherever he uses this stuff to determine from the condition of the skin whether he has recently used the syringe?

A. Sometimes you are.

Q. If you will refer again to the examination you made on Martin, did your examination reveal to you that he was an addict?

A. Sir, the defense is addict, if you would say drug user.

Q. Did the thing indicate to you he was or had been a drug user?

A. Yes, sir.

Q. Now with respect to the person known to you as Martin, did you examine him?

A. Yes, sir.

Q. And by reason of your examination of him were you able to determine that he was also a drug user?

A. The same person we were just speaking about?

Q. No, I am talking about now, about Palmer. I beg your pardon.

A. Yes, sir.

Q. And from that examination did you determine that he was a drug user?

A. Yes, sir.

[fol. 76] Q. Did you examine the person known as James Daniel?

A. Yes, sir.

Q. And from that examination did you determine that he was a drug user?

A. Yes, sir.

Q. Did you examine the person known as Earline, I don't know her last name?

A. Earline Richardson, just her arms, sir.

Q. Did you determine she was a drug user from your examination?

A. From her arms, yes, sir.

Q. Catherine Walters, did you examine her?

A. Yes, sir.

Q. Did your determine from your examination whether she was a drug user?

A. Yes, sir.

Q. You spoke something about a bird's nest, this apartment was on the third floor, wasn't it?

A. Yes, sir.

Q. On some of the windows, did they not have these awnings that come down about half way, say an angle?

A. Yes, sir, the awning covered the upper half of the window.

Q. Were some of the awnings folded back instead of being down?

A. Yes, sir.

[fol. 77] Q. Was the awning in this bathroom window, was that awning folded back or was it down this way?

A. The awning was folded back.

The Court: I think we will suspend at this time for our usual mid-morning recess.

The Marshal: This Honorable Court stands recessed for a period of ten minutes.

The jurors will retire to the jury room.

(After mid-morning recess:)

Cross-examination (Continued):

By Mr. McKenzie:

Q. Officer Didoné, when you spoke about this bird's nest, was that awning there a place where pigeons came to roost?

A. What appeared to be, sir. You have the bathroom window, the upper half has an awning around the entire three sides which joins about middle of the window. The awning was pressed back against the building. The fold which forms creases or folds it each way and each of these

folds had a little piece of grass and twigs and as I recall it the one where the capsule was had one pigeon egg and the other on the other side had two pigeon eggs. There were folds around them and the birds had some nests in them.

Q. Now let me ask you, sir. Are you acquainted with a person by the name of Evans, Arthur, do you know of him?

A. No, no personal knowledge, sir.

[fol. 78] Q. In your investigation of this case did you learn he was the person who leased this apartment?

A. I was told that.

Q. When we appeared in this matter down before Judge Laws, do you recall when you testified I don't know that you testified?

A. I did not testify at all.

Mr. McKenzie: Will you indulge me for just a moment, perhaps I may be able to say the defendant has no further questions at this time.

Redirect examination.

By Mr. Stevas:

Q. Officer Didone, the narcotic, the capsule of white powder which you obtained from these premises was that in the original stamped package?

A. No, sir.

Q. Were there any stamps affixed to it to indicate it had come from the original affixed package?

A. No, sir, the capsule is as it is now.

Q. I will ask you this: Answer the question yes or no. You have testified about examinations you made of various people and with regard to needle marks, did you make an examination of the defendant in this case?

A. Yes, sir.

Q. Did you subsequently have a conversation with the defendant concerning your examination?

[fol. 79] A. Yes, sir.

Q. Did you have a conversation, Officer Didone, with the defendant concerning whose apartment this was, that is apartment 36?

A. Yes, sir.

Q. What was that conversation?

A. The defendant said that the apartment had originally belonged to Arthur Evans who was in Philadelphia, Pennsylvania, and that he and Earline Richardson were living there.

The Court: That he was what?

The Witness: That he and Earline Richardson were living there.

By Mr. Stevas:

Q. By he you are referring to whom?

A. The defendant.

Mr. Stevas: Your Honor, I have no further questions of this witness.

The Court: You may step down.

Mr. Stevas: May this officer be excused subject to recall so he may return to duty?

The Court: He may.

(Witness left stand.)

Mr. McKenzie: Before Officer Didone goes, may we recall him just briefly for one moment?

The Court: Yes, indeed.

[fol. 80] Mr. McKenzie: Mr. Stevas, will you recall him before he leaves so I may ask him just a few more questions?

Mr. Stevas: Yes, sir.

Whereupon Thomas Didone, Jr., was recalled as a witness on behalf of the Government and, having been reminded he was still under oath, resumed the stand, was examined and testified further as follows:

Recross-examination.

By Mr. McKenzie:

Q. I think, if I recall correctly, you got the little capsule?

A. Yes, sir.

Q. The other things you found that day, the stove, the needle, and those things in it, when you first saw them were they in that paper?

A. They were wrapped up in the paper and tied with the silk stocking.

Q. The way you had it when you first came here?

A. Exactly.

Q. You were there and saw your fellow officer obtain it?

A. Yes, sir, I was standing about a foot away from him.

Mr. McKenzie: That is all I have of this witness.

The Court: You may step down.

Mr. Stevas: Officer Didone, will you put those back in the brown envelope.

(Witness left stand.)

[fol. 81] Whereupon JOHN HURST BONAPARTE, was called as a witness on behalf of the Government and, having been duly sworn, took the stand, was examined and testified as follows:

Mr. Stevas: Now Officer Bonaparte, I am going to ask you to keep your voice up as I am doing so everyone here can hear what you have to say.

Direct examination.

By Mr. Stevas:

Q. Please tell us what your name is?

A. John Hurst Bonaparte.

The Court: Officer, I suggest you speak a little louder and more distinctly because there are quite a few people in the courtroom and this is a big courtroom.

By Mr. Stevas:

Q. You are with the Metropolitan Police Department?

A. Yes, sir, I am.

Q. Assigned to the Narcotic Squad?

A. Yes, sir.

Q. And you were so assigned during August of last year?

A. Yes, sir.

The Court: You are a member of the Metropolitan Police Department?

The Witness: Yes, sir.

[fol. 82] By Mr. Stevas:

Q. An officer therein?

A. Yes, sir.

Q. You are assigned to the Metropolitan Police Department the Narcotics Squad?

A. Yes, sir.

Q. Were you so assigned in August of 1957?

A. Yes, sir.

Q. What is your rank?

A. Private.

Q. Do you know Officer Thomas Didone?

A. Yes, sir, I do.

Q. Directing your attention to the date of August 21, 1957, did you have an occasion to go any place with Officer Didone?

A. Yes, sir, I did.

Q. Where was this that you went?

A. To 1436 Meridian Place, Northwest.

Q. When you arrived at those premises what did you do?

A. I was instructed to remain outside. I was directed to remain outside the premises and watch the windows of the third floor.

Q. Did you remain outside watching the windows?

A. Yes, sir, I did.

Q. While you were outside of the premises watching the windows did you see anything happen?

[fol. 83] A. Yes, sir, I saw something happen.

Q. Now will you tell His Honor and the jury what you saw?

A. While I was standing outside the window I could hear a knocking from the building and a colored male came to the window on the third floor and yelled down to me and said that someone was knocking on his door and to call the janitor. While this person was calling down to me he was putting his hand on the awning which seemed to have a bird's nest in it.

Q. Now, do you see that person here today that called down to you and did what you have described?

A. Yes, sir.

Q. Where is that person?

A. The colored male sitting over there with the brown shirt on.

Mr. Stevas: May the record show the witness points to the defendant.

The Court: The record may so show.

By Mr. Stevas:

Q. Now Officer, after the voice called down to you and you saw what happened what did you do?

A. I continued to watch the window.

Q. Then what happened?

A. This person disappeared from the window for a few minutes and Officer Didone came to the window and asked me had I seen anyone at the window. I stated I had and at [fol. 84] that time he brought the defendant back to the window and asked me if this was the man and I told him that it was the man I had seen at the window.

Q. Is there any doubt in your mind about that being the same person?

A. No, sir, there isn't.

Mr. Stevas: No further questions, Your Honor.

Cross-examination.

By Mr. McKenzie:

Q. Officer Bonaparte, this series of windows you were instructed to observe, they were on the third floor, is that correct?

A. Yes, sir.

Q. Now the man came to the bathroom window did you notice there was an awning over that window?

A. Yes, sir, I did.

Q. Was that awning closed?

The Court: Oh, no, please do not pick any papers from the clerk's desk, they may be important.

A. (Witness continuing): The awning was partially closed.

Q. Now when that awning closed were there folds in it, something like this?

A. Something similar.

[fol. 85] Q. Now you were so far down you had to look up to see the bottom of that awning, did you not?

A. Well, I was on the ground.

Q. You weren't in a position where you could see something above you and look down into it, were you?

A. No, sir, I wasn't.

Mr. McKenzie: Your Honor, will you indulge me for a moment?

The Court: Surely.

Mr. McKenzie: No further questions.

Mr. Stevas: May this witness be excused, Your Honor?

The Court: The witness may be excused.

(Witness left the stand.)

Mr. Stevas: May I call Mr. Butler.

Whereupon WILLIAM P. BUTLER, was called as a witness on behalf of the Government and, having been first duly sworn, took the stand, was examined and testified as follows:

Direct examination.

By Mr. Stevas:

Q. Will you tell us your name, please?

A. William P. Butler.

Q. That is B u t l e r?

A. That is correct.

Q. Your occupation?

[fol. 86] I am employed as a chemist by the Internal Revenue Service of the Treasury Department.

Q. How long have you been so employed?

A. Six and half years.

Q. In connection with your employment there do you have an occasion to examine various items submitted to you to determine what the contents of the items are?

A. Yes, sir, I do.

Q. I hand you, sir, what for the record has been marked Government Exhibit 1 for Identification purposes. I will ask you to first examine that and having examined it are you able to identify it?

A. Yes, sir, I can. I have my initials on the upper left hand corner of the marked sealed envelope.

Q. When did you first examine Government Exhibit 1 for Identification?

A. I received it from Detective Didone of the Metropolitan Police Department on the 9th day of September 1957.

Q. At the time you received Government Exhibit 1 for Identification, in what condition was it?

A. It was sealed and in tact at the time that I received it. And I slit the end open after receiving it.

Q. Upon slitting Government Exhibit 1 for Identification open what did you do?

A. I extracted the material which consisted of a brown [fol. 87] manila envelope which contained a piece of white paper toweling and that in turn contained a bottle top cooker, three syringes, and three needles. There was also a small manila envelope which contained one gelatin capsule.

Q. What, if anything, did you do with those items contained in Government Exhibit 1 for Identification?

A. I examined each of the items and found that the gelatin capsule contained 1.2 grains of a powder consisting of heroin hydrochloride, quinone hydrochloride, and milk sugar. The cooker, the three syringes, and the three hypodermic needles on examination proved to have traces of heroine hydrochlorate, quinone hydrochlorate, and milk sugar. That is, each one of the objects had those same traces.

Q. Now would you remove the contents at this time of Government Exhibit 1 for Identification? I want to ask you first to examine what you have in your hand, Government Exhibit 1a, have you seen that before?

A. Yes, sir, this Government Exhibit 1a is the manila envelope which was contained in Government Exhibit 1 when it was handed to me.

Q. In what condition was Government Exhibit 1a when you first saw it?

A. The envelope was sealed and in fact when I received it. Afterwards I cut the end of this envelope open to extract the material contained within.

[fol. 88] Q. Is that the same capsule that contained the 1.2 grains of heroine?

A. Yes, sir, it is.

Q. With regard to the other envelope, Government Exhibit 1b, would you examine the contents of that, sir, and having examined those contents, is that what you referred to in your previous testimony concerning the needles, syringe, and cooker?

A. Yes, sir, it is.

Mr. Stevas: No further questions, Your Honor.

Mr. McKenzie: I have no questions of this witness.

The Court: Very well. You may step down.

(Witness left the stand.)

OFFERS IN EVIDENCE

Mr. Stevas: If your Honor please, at this time The Government would like to have received into evidence, Government Exhibit 1 and the contents, Government Exhibit 1a and 1b for Identification.

The Court: They may be admitted.

(Documents marked Government Exhibit 1, 1a and 1b for Identification were admitted into evidence.)

Mr. McKenzie: And will the record indicate that the defendant renews his objection to this evidence being admitted?

The Court: The record may so indicate.

Mr. Stevas: The Government rests its case, Your Honor.

The Court: Just a moment. You may pass those exhibits to the jury, if you wish.

[fol. 89] Mr. Stevas. I am a little leary of passing the needle.

The Court: Suppose you just exhibit them. You may use your own discretion whether to exhibit or pass them.

Mr. Stevas: As long as they are warned that they are sharp needles I have no hesitancy in passing them.

Mr. McKenzie: When the jury has concluded its examination of this evidence, I will ask you for a ten minute

recess so I may confer with the defendant as to whether or not he is desirous of taking the stand.

The Court: You may do so at this time. You may take him into the cell if you wish.

Mr. McKenzie: I found it difficult to suggest to you the conduct of a law suit but I believe he should be here while this is going on.

The Court: Oh, I do not think so. There is not anything being said or done.

Mr. McKenzie: I am ready to put the defendant on the witness stand but I ask leave pot to examine until the jury is finished with this exhibit.

The Court: I do not do this.

Mr. McKenzie: They cannot watch and listen to this too and I object.

The Court: Very well.

[fol. 90] Whereupon CECIL JONES, The defendant, took the stand in his own behalf and, having been duly sworn, was examined and testified as follows:

Mr. McKenzie: Now Mr. Jones, when you answer questions, if you speak, perhaps, as loudly as I do so the jurors on this end of the box can hear you, and they will understand what your position is, and maybe help you, if it is possible.

Direct examination.

By Mr. McKenzie:

Q. What is your name?

A. Cecil Jones.

Q. How old are you?

A. 31.

Q. Now with respect to the date of 21 August 1957, you have heard the testimony of the two policemen who testified, Didone and Bonaparte, is that right?

A. Yes, sir.

Q. Now I ask you this question: On that date were you at any time in apartment 36 as described in this warrant?

A. Yes, sir.

Q. Now while you were in that apartment did you have an occasion to go to a bathroom window?

A. Yes, sir, I did.

Q. Now, why did you go to the bathroom window at that time?

[fol. 91] A. I went to the window and I saw this officer down on the ground.

The Court: Speak slowly and distinctly.

By Mr. McKenzie:

Q. Now Mr. Jones when you say this officer, do you mean the last officer who testified?

A. Officer Bonaparte.

Q You saw him below?

A. Yes, sir.

Q. Then what did you do?

A. I told him to get the janitor and see who was at the front of the door.

Q. What was going on at the door that caused you to do that?

A. Because someone knocked on the door and said "open the door. Knocked and said it is Jack, Jim, open the door, Cecil."

Q. Now, was the person in front of your door pounding hard? Knocking vigorously?

A. Yes, sir, they were.

Q. When you addressed Officer Bonaparte on the ground below, having asked him to go get the janitor, did he say anything?

A. He told me, he say, "open the door and see who it is.

[fol. 92] Q. That is what Officer Bonaparte said?

A. That is what he said.

Q. Then did you leave the window?

A. Yes, I did.

Q. Then what happened next?

A. A knock came on the door again and I said "Who is it"? And he said: "It is the janitor."

Q. Then what happened?

A. Then when I cracked the door it came on open.

Q. How many locks were on that door?

A. There was three locks with the night latch.

Q. Did you open any of the locks before you opened the door?

A. I opened two.

Q. Was the night latch on?

A. The latch was on.

Q. Do you mean a chain that goes from the sill to the door?

A. Yes, sir.

Q. When you heard the remark it is the janitor and opened the door, did Officer Didone show you a package and say it was a permit?

A. No, sir, he didn't show me a package, he didn't show me a warrant, he didn't say he was a policeman before he came into the apartment.

[fol. 93] Q. Now when you went to the window did you hear Officer Bonaparte say you made some motion with one of your arms. Will you tell His Honor and the jury what you did there?

A. Well when I was at the window I had to hold the window up because it wouldn't stay up so I had to hold the window up so I told him to go and get the janitor. That is why I held the window up.

Q. Now you observed, did you not, the exhibit that had the stocking, the needle, and cooker, that Officer Didone identified when he was testifying?

A. I did.

Q. And the little pill that he identified. Now did that pill belong to you?

A. No, sir.

Q. Did you put that pill in an awning outside that apartment?

A. No, sir.

Q. Did you put that paper with the stocking wrapped around it containing those needles in an awning outside the apartment?

A. No, sir.

Q. And when you were interrogated about ownership, you denied ownership, did you not, at all times?

A. Yes, sir, I did.

[fol. 94] Q. Now on the morning of August 21, or rather in the afternoon, when the police entered the premises, entered that apartment at 1436 Meridian Place, were these

persons present as well as you? That is, James Daniels, Cicero Martin, John Palmer, Catherine Walters, and Earline Richardson?

A. Yes, sir, they were.

Q. All day were they in that apartment when you came to it?

A. Yes, sir, they were.

Q. These persons, with who you have had some acquaintance for some period of time, you know these people, do you not?

A. I know Cicero Martin.

Q. You know him?

A. Personally.

Mr. McKenzie: Your Honor, I may be repeating myself, but it is only one question and if I do, I must, as regards these articles, the pill, the needles, the cooker, and the stocking.

By Mr. McKenzie:

Q. Did you ever own any of those articles?

A. No, sir, I did not.

Q. Did you ever place any of them in that awning?

A. No, sir.

Mr. McKenzie: I have no further questions of the [fol. 95] defendant.

Cross-examination.

By Mr. Stevas:

Q. Did you know Officer Didone before August 21, 1957?

A. I have met him before, yes, sir.

Q. Now you knew these other people in the premises in addition to Mr. Martin, did you not?

A. I don't quite understand what you mean about knowing——

Q. You were staying in this particular apartment on August 20 and 21st were you not?

A. No, sir.

Q. Isn't it a fact you had your clothes in this apartment on August 21?

A. That I had to put on.

Q. Now isn't it a fact you told the police officer that the apartment belonged to Mr. Evans who had gone to Philadelphia and he was allowing you to stay in the apartment?

A. He didn't allow me to stay in the apartment, sir.

Q. You had a key to the apartment, did you not?

A. Yes, sir, I did.

Q. What were you doing with the key to the apartment?

A. He told me I could use the apartment if I wanted to.

Q. Weren't you using the apartment on August 21?

A. I was there.

Q. Were you not there on August 20, the day before?

[fol. 96] A. Yes, sir.

Q. And was not Earline Richardson there with you on 20 August 1957?

A. No, sir.

Q. She was there on the 21st?

A. Yes, sir.

Q. What time did she come there on the 21st?

A. I don't know.

Q. Had you spent the night there on 20 August?

A. No, sir.

Q. Where had you spent the night?

A. 811 Ninth Street, Northeast.

Q. For what reason did you go to these premises on 21 August?

A. I went there to get Earline Richardson.

Q. Was she there when you got there?

A. Yes, sir, she was there.

Q. What time did you arrive?

A. I would say around 4:30 or maybe 5:00.

Q. In the afternoon?

A. Yes, sir.

Q. Were all these other people already there?

A. Yes, sir, they were there.

Q. You knew all of these other people didn't you?

A. Not personally, sir.

[fol. 97] Q. You were talking there with them?

A. Yes, sir, I was talking.

Q. Weren't you introduced to them by Earline Richardson?

A. No, sir.

A. You didn't know their names?

A. I knew their names.

Q. What were you all doing in the apartment from 4:30 on?

A. We were talking.

Q. About what?

A. About going out?

Q. Was there anybody taking any narcotics up there at that time?

A. No, sir, not to my knowledge.

Q. Now why did you go to the door when there was a knock on the door?

A. I went to the door to open it.

Q. Now you didn't open it?

A. After Officer Didone, he stated he was the one who knocked on the door, he stated it was Jack, Jim, and I don't know anyone by the name of Jack or Jim.

Q. You weren't doing anything wrong in the apartment at that time?

A. No, sir.

Q. This was about 5:00 or 5:15 in the evening?

A. Yes, sir.

[fol. 98] Q. You had other friends in your apartment?

A. Other people.

Q. Other people including men?

A. Yes, sir.

Q. There were other people living in the building?

A. Yes, sir.

Q. Can you give us any reason why you did not open the door to see who was there when the knock first came?

A. Because the knock on the door, it was not an ordinary knock, it was a deliberate pounding as if they wanted to break in the door.

Q. The person told you he was Jim or Jack?

A. I don't know anyone by the name of Jim or Jack.

Q. Did you open it up to see if you knew the person who was pounding or tell them to go away?

A. I asked who was it.

Q. Then you went to the bathroom window?

A. Yes, sir.

Q. You deny you put your arm outside the bathroom window as Bonaparte testified you did?

A. Yes, sir, I do.

Q. By the way, were you present when Earline Richardson was questioned by the officers?

A. Yes, sir. In the apartment?

Q. Yes, sir.

[fol. 99] A. Yes, sir.

Q. Isn't it a fact that after the first knock on the door that you took a group of capsules from off the table and went to the bathroom with those?

A. No, sir.

Q. Did you flush the toilet in the bathroom after the first knock?

A. No, sir.

Q. Now after the first knock did the person continue to knock while you were going to the bathroom?

Witness: Will you state that again?

Q. After the person knocked at the door there and told his name was Jim or Jack, whom you didn't know, you then went to the bathroom, is that right?

A. No, sir.

Q. Well, when did you go?

A. I went when they continuously pounded on the door and he wouldn't tell me his name. All he would say was "Jim, Jack, open the door."

Q. Why did you go to the third floor bathroom window at that time?

A. That was the only window that was close to me at the door.

Q. Did you know somebody was going to be outside that window?

A. No, sir, I did not.

[fol. 100] Q. Did you go to the window for the purpose of calling someone three floors down?

A. Yes, sir, to see if somebody was there.

Q. No telephone in the apartment?

A. No, sir.

Q. When you went to the door the second time after you had been to the bathroom there was another knock on the door?

The Witness: State that again, please.

Q. The first time you went to the door you didn't open it, is that right?

A. Yes, sir.

Q. After you had been to the bathroom and told him to get the janitor then you went back to the door, did you not?

A. No, sir.

Q. You never went back to the door?

A. Not at that time.

Q. And subsequently after you had been to the bathroom window, did you not go back to the door?

A. After the janitor knocked.

Q. How did you know it was the janitor knocking?

A. By his voice.

Q. You did not recognize Officer Didone's voice?

A. No, sir.

Q. After the janitor knocked you went to the door?

A. Yes, sir.

[fol. 101] Q. This wasn't your apartment?

A. No, sir.

Q. Did anyone else go to the door?

A. No, sir.

Q. When you went to the door this time you knew it was the janitor?

A. Yes, sir.

Q. How did you recognize his voice?

A. Because I had talked to him once before.

Q. When before?

A. One day he was working on his car and I happened to come past.

Q. How long before this incident?

A. I would say maybe five or six days before.

Q. On this occasion you had no fear in opening the door?

A. Not when the janitor called.

Q. Now did you remove the little chain on this occasion?

A. When I opened the door?

Q. Yes, sir?

A. No, sir.

Q. Why?

A. Because the officer snatched it open.

Q. You unlocked the door when you pulled it open?

A. Yes, sir.

Q. When you unlocked the door you believed the janitor [fol. 102] was outside?

A. Yes, sir.

Q. When you unlocked the door can you tell us why you didn't remove the little chain?

A. I didn't have time, the officer snatched the door.

Q. How do you know?

A. Officer Didone was the first man in the door and said "the police" and grabbed me around the neck. He didn't have anything in his hand, he just pulled the door open and grabbed me around my neck and said "police."

Q. Which hand did he grab you around the neck with?

A. I can't say.

Q. He didn't grab you with both hands?

A. No, sir, one hand.

Q. What was in the other hand?

A. I didn't see anything, sir, he was pushing me.

Q. Didn't he give you a copy of a search warrant?

A. After everyone was gone, after he made his statements in the room.

Q. Didn't he take you to the bathroom?

A. Yes, sir.

Q. When you told this man down below about going to the janitor, you didn't know he was a police officer?

A. At that time it didn't matter either.

Q. He didn't have a police uniform on?

A. No, sir.

[fol. 103] Q. Are you the same Cecil Jones who was tried here in this court and sentenced on May 28, 1948 for the offense of receiving stolen property?

A. Yes, sir.

Mr. Stevas: I have no further questions, Your Honor.

Mr. McKenzie: No further questions.

The Court: You may step down.

(Witness left stand and resumed his seat at his counsel's table.)

Mr. McKenzie: Your Honor, may we approach the bench for a moment?

The Court: Yes, indeed.

(At the bench:)

Mr. McKenzie: Your Honor, I want to ask you for a little help or enlightment. Although this is an assigned

case, I want to protect the record and I need that search warrant. There is an affidavit in connection with any possible appeal as to the exclusion of the evidence.

The Court: The record will be placed in this file.

Mr. McKenzie: I do not have to introduce that into evidence to protect that point?

The Court: No, you do not have to. That is——

Mr. Stevas: They should put these in the file as soon as they get them from the Commissioners. Unfortunately, the Clerk's office is too busy.

[fol. 104] The Court: That is not the reason. When they get the search warrants from the Commissioner's Office, they do not always know which case it applies to, because the same search warrant might apply to two or three different cases. So they keep the search warrants separately in the Clerk's Office until they need it on a particular case.

Mr. Stevas: I have no objection to it being put on the record that it is a part of the file.

Mr. McKenzie: I rest.

The Court: How much time do you need for summing up?

Mr. Stevas: I think five minutes.

MOTION FOR JUDGMENT OF ACQUITTAL, ETC.

Mr. McKenzie: Maybe ten. But before I do that I want to put on the record a motion for judgment of acquittal. I move for a judgment of acquittal on the strength of the Jackson case because I think the requirement possession is not shown here.

The Court: What is the Jackson case?

Mr. McKenzie: I have it on my desk. May I bring it up?

The Court: Jackson against the United States decided December 19, 1957. I do not think that case applies. The Government's evidence in this case is to the effect that the defendant was seen putting something in a little bird's nest and when the bird's nest was searched, the narcotic [fol. 105] paraphernalia and the capsule were found in it. This is entirely different from the Jackson case.

Are there any requests for instructions?

Mr. McKenzie: In my opinion the statutory presumptions will not apply in this case. There has been a denial of possession completely.

The Court: I am of the opinion that the statutory presumption applies and if the jury finds that the defendant had possession of the narcotics—of course, the first question the jury has to decide is whether he had possession, and if he had possession, according to the officers he did have possession, it is for the jury to resolve the conflict. Now if the defendant had possession then the statutory presumption applies.

Mr. McKenzie: In arguing to the jury will you permit me to urge them to consider that this contraband might very well have belonged to other persons in the apartment, who have been described as being in the position to——

The Court: You have a right to argue that. My view of the law is this: Counsel has the right to refer to anything that is in evidence. The Court has no right to censor either the logic or the cogency of arguments.

(Following bench conference:)

(At the bench:)

Mr. McKenzie: Your Honor, before your charge to the jury, I suggest that the remarks made by the prosecutor [fol. 106] with regard to the search warrant, the information which lead to its issuance, about the interest in this case, it is improper and prejudicial and I ask or make a motion for mistrial.

The Court: Motion denied.

(Following bench conference:)

The Court: Ladies and gentlemen of the jury, we will take our luncheon recess at this time. In the meantime, please do not start discussing this case until after we return and The Court has given your its instructions.

(The court recessed at 1225 hours, and resumed at 1.45 P. M., 31 January 1958.)

Charge to the Jury

The Court (Holtzoff, J): Ladies and gentlemen of the jury, the defendant, Cecil Jones is on trial on a charge of violating the narcotic laws. It now becomes your duty to determine whether the defendant is guilty or not guilty of the charge on which he is being tried. This decision must

be made by you solely upon the evidence introduced at this trial. You must reach your decision calmly, objectively, deliberately, and impartially, without any feeling or emotion, without any sympathy on the one hand or anger on the other, or any other feeling; and you must not be swayed by oratory or eloquence; you must decide the case solely on the evidence, in accordance with the rules of law that I am about to summarize for you.

[fol. 107] As you understand, it is my function to instruct the jury as to the rules of law that must govern the disposition of this case, and my instructions as to the law are binding on you. You are obligated to follow The Court's instructions as to the law, but you, ladies and gentlemen of the jury, are the sole judges of the facts. What I say about the facts and the evidence, and it is part of my function to discuss them to the extent to which it appears desirable, is not binding on you. My discussion of the facts and the evidence is intended only to help you. You are the final judges of the facts, and must decide the facts yourselves on the basis of the evidence introduced at the trial. My instructions are binding on you only as to the law.

To summarize very briefly a few general principles of law, with which you have become familiar during the past month, and which it is my duty to bring to the attention of the jurors in this and every case. Every defendant in a criminal case is presumed to be innocent, and this presumption of innocence attaches to him throughout the trial. The burden of proof is upon the Government to prove the defendant's guilt beyond reasonable doubt. Unless the Government sustains this burden and proves beyond a reasonable doubt that the defendant has committed every element of the offense with which he is charged, the jury must find him not guilty.

[fol. 108] But proof beyond a reasonable doubt, as I have had occasion to say to you in other cases, does not mean proof beyond all doubt whatsoever. It is erroneous to say that you must give the defendant the benefit of every doubt. This is not the law. You must give the defendant the benefit of a reasonable doubt. The law says reasonable doubt. Proof beyond a reasonable doubt means proof to a moral certainty. It does not mean proof to an absolute

or mathematical certainty. By reasonable doubt, as its very name implies, is meant a doubt based on reason, not just some capricious conjecture or some whimsical speculation. Proof beyond a reasonable doubt may be defined as such proof as will result in an abiding conviction of the defendant's guilt on your part, such a conviction as you would be willing to act upon in the more weighty and important matters relating to your own affairs.

You will consider and weigh the testimony of all witnesses who have testified at this trial as well as all the circumstances concerning which testimony has been introduced. You are the sole judges of the credibility of the witnesses. It is for you and you alone to determine whether to believe any witness and the extent to which any witness should be credited. In case there is a conflict in the testimony, it is your function to resolve that conflict and to determine where the truth lies. If you find that any witness wilfully testified falsely as to any material fact [fol. 109] concerning which the witness could not have reasonably been mistaken, you are then at liberty, if you deem it wise to do so, to disregard the entire testimony of that witness, or any part of the testimony of the witness.

The defendant took the stand in his own behalf and it appeared on his cross-examination that he has a criminal record. The law admits the criminal record of any witness, be that witness the defendant, or anyone else. Of course, the fact that the defendant has a criminal record has no bearing on the question of guilt or innocence of the charge of which he is being tried. That charge has to be established by evidence independent of anything else but the law admits the criminal record of any witness and permits the jury to consider it for the purpose and as a help, in determining whether the witness was a trustworthy witness when he took the witness stand and whether his testimony should be believed. The jury has a right, if it chooses to do so, to reach the conclusion that a person with a criminal record should not be believed as a witness, to the same extent as a person whose record is unblemished. That is all for the jury to decide.

Now let me come to the consideration of the precise charges involved in this case. The defendant is charged with two violations of the narcotic law, and this leads me

to say a few words to you about the law relating to narcotics. Narcotics have a recognized, legitimate use in [fol. 110] medicine. On the other hand, their use when not under the supervision of a physician and for legitimate medical purposes, is regarded as dangerous and susceptible of an evil influence. For this reason the traffic of narcotics is regulated by law not only in order that narcotics may be available solely for medicinal purposes under the supervision of a physician but, in order that they may not be obtained for illicit and illegal uses. Accordingly, the law provides strictly the manner in which and the channels through which, narcotics may be obtained legitimately, and it specifically prohibits and makes criminal any traffic in narcotics except in the manner permitted by law.

Now one of the laws which is involved in this case reads as follows:

> "It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of an appropriate taxpaid stamp from narcotics drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found."

In other words, to put it simply, the violation of law consists of purchasing, selling, dispensing, or distributing a narcotic drug except in the original stamped package or [fol. 111] from the original stamped package. Now the law goes a step further. It does not require direct proof of a purchase, sale, dispensing, or distributing of a drug. The statute specifically states that the absence of an appropriate taxpaid stamp from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found. In other words, if you find the defendant had possession of the drug involved in this case and while in his possession there were no appropriate taxpaid stamps for the drugs, those facts constitute prima facie evidence of a violation of the statute and the jury may find the defendant guilty on that charge without requiring any further proof. Of course, whether or not the defendant had possession of

the capsule of heroin involved in this case is for you to determine.

Now the first count of the indictment charges a violation of the statute that I have just read. It charges the defendant with having on August 21, 1957 purchased, sold, and dispensed not in the original stamped package and not from the original stamped package, a narcotic drug, that is, one capsule containing a mixture of heroin hydrochloride, quinone hydrochloride, milk sugar, and some other gadgets.

The second count charges a violation of another statute which reads as follows:

> "Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States, or any [fol. 112] territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates transportation or sale of such narcotic drug, after being imported or brought in, knowing the same to have been imported contrary to the law, shall be punished by the penalty the statute describes."

In other words, the law makes it a criminal offense either to fraudulently or knowingly import any narcotic drug into the United States contrary to law or to receive, conceal, buy, sell, or facilitate the transportation or concealment of sale of any such narcotic drug, knowing the same to have been imported contrary to law. Now the law goes a step further. It provides that the Government does not have to prove every element of the offense as the statute analyzes. If the defendant is shown to have possession of the narcotic drug such possession, the statute provides, shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

In other words, if you find the defendant had possession of this narcotic drug referred to in the indictment, from that fact alone, you are at liberty to find the defendant guilty of a violation of the statute without anything more, unless the defendant either by himself or by some other witness, explains the possession of the drug to your satis- [fol. 113] faction. The reason is this: All narcotic drugs

are imported and the presumption is they have been imported illegally unless the contrary appears, according to the statute to which I have just referred. The law relating to narcotic drugs includes opium, and any compound, salt, derivative, or preparation of opium. Heroin is a derivative of opium, and, therefore, the law relating to narcotics applies to heroin which is involved in this transaction.

Now this trial took a very short time and the evidence is very brief. The issue is very simple and you could decide it easily one way or another and, therefore, I shall not devote very much time to discussing the evidence but I shall summarize it in a skeletonized fashion very briefly.

Pursuant to a search warrant the police officers went to an apartment which, at that time, was occupied by the defendant. One of the officers testified that there was a knock on the door. One of the officers having been stationed outside, that officer testified he saw the defendant go to the window and put his hand into a bird's nest in the awning outside the window. Another officer testified when they walked into the premises, pursuant to a search warrant, they followed the defendant into the bathroom and recovered from that bird's nest, narcotic paraphernalia and one capsule of white powder which the Government Chemist testified contained heroin hydrochloride, and, also, he testi- [fol. 114] fied that needles and syringes that were among the narcotic paraphernalia had traces of heroine hydrochloride on them. Now, the defendant took the witness stand and denied that he put anything in the bird's nest and he denied that the paraphernalia and the capsule of narcotics belonged to him. It is for you to decide where the truth lies. This is your function. What I have said about the evidence is not binding on you. You must make your own decision and my remarks on the evidence are intended only to help you. My instructions are binding on you only as to the law. But again in reaching your decision, as I have suggested to you on other occasions, you must use the same practical approach, the same ordinary intelligence, the same ordinary common sense, that you would employ in determining any other important matter that you have occasion to decide in the course of your every day life.

You will render a separate verdict on each of the two counts of the indictment. In each instance, your verdict should be guilty or not guilty and, of course, as you are well aware, you must reach your verdict by an unanimous vote.

Are there any suggestions or objections?

Mr. Stevas: No, sir, Your Honor.

Mr. McKenzie: May we approach the bench, Your Honor?

The Court: Yes, indeed.

(At the bench:)

Mr. McKenzie: Would you consider defining to the jury what you mean by the term "moral certainty"?

[fol. 115] The Court: I decline to amplify my instructions specifically as there has been no previous request but even so I would be glad to amplify if I thought that the ends of justice so required.

Mr. McKenzie: I ask you now to instruct the jury on the defendant's theory there were three other persons in there who were addicts and that possibly the possession was in them?

The Court: I decline to give any such instructions.

Mr. McKenzie: I ask you finally to instruct them as to the law on possession, what possession means.

The Court: What is your specific request? You know I offered you an opportunity to submit requests prior to my instructing the jury.

Mr. McKenzie: I certainly do, but I certainly did not know anything about this case until yesterday afternoon.

The Court: I think I shall not entertain an oral request to instruct the jury as to possession unless you state what you request me to instruct.

Mr. McKenzie: I request you to charge the jury that there is no evidence of actual possession of the contraband in the defendant.

The Court: I decline so to charge. The jury has a right to find from the evidence that the defendant had the contraband in his hand and put it in the bird's nest.

Mr. McKenzie: Finally, I want it put in the record that since this is an assigned case that I have been almost [fol. 116] every day in this Court. This fellow is confined in the jail and I can visit him from nine until three, and

from nine until three I was up here so if I did not have a better preparation or more requests. I have had no opportunity.

The Court: I think you have done a very good job. As a matter of fact, I have often made the remark and I mean it in all sincerity, that many of the lawyers do a better job for their unpaid clients, or at least as well, as they do for their paid clients. I do not mean you neglect your paid clients but you certainly do a conscientious job for your unpaid as well.

Mr. McKenzie: These people, they come in here and say, McKenzie, you be our lawyer.

(Following bench conference:)

The Court: Ladies and gentlemen of the jury, the twelve regular jurors may now retire. Upon reaching the jury room you will first select a foreman from amongst yourselves, who will preside over your deliberations as your chairman, and then you will proceed to reach a verdict. The twelve jurors may follow the marshal and the two alternate jurors will retain their seats for a moment.

(The twelve regular jurors followed the marshal from the courtroom.)

The Court: At this time the Court wishes to thank the two alternate jurors for their participation in this trial.

[fol. 117] Reporter's Certificate to foregoing transcript omitted in printing.

[fol. 118] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Criminal No. 1022-57

UNITED STATES OF AMERICA

v.

CECIL JONES

JUDGMENT AND COMMITMENT—March 3, 1958

On this 3rd day of March, 1958 came the attorney for the government and the defendant appeared in person and by counsel, T. Emmett McKenzie, Esquire.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of Violation of Section 4704a, Title 26 of the U.S. Code; Violation of Section 174, Title 21 of the U.S. Code, as charged, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It is Adjudged that the defendant is guilty as charged and convicted.

It is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Two (2) years and Four (4) months to Seven (7) years on count one; Seven (7) years on count two, to run concurrently with the sentence imposed on count one.

It is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Alexander Holtzoff, United States District Judge.

[fol. 119] [File endorsment omitted]

IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Criminal No. 1022-57

UNITED STATES

vs.

CECIL JONES

AFFIDAVIT IN SUPPORT OF APPLICATION FOR LEAVE TO PROCEED WITHOUT PREPAYMENT OF COSTS ON APPEAL—Filed March 12, 1958.

[Title omitted]

I, Cecil Jones, being first duly sworn according to law, depose and say that I am the — in the above-entitled cause, and, in support of my application for leave to proceed in said cause without being required to prepay fees or costs, state as follows:

1. That I am a citizen of the United States.
2. That because of my poverty I am unable to pay the costs of said suit or action.
3. That I am unable to give security for the same.
4. That I believe I am entitled to the redress I seek in said suit or action.
5. That the nature of my cause of action is briefly stated as follows:

I was indicted; tried by jury and convicted of violation of Title 26—4704a and Title 21—174, U.S.C. Motions to suppress evidence made prior to trial were denied; at trial they were renewed and trial court *held* the ruling at pre-trial was binding and that the question could not be again legally raised at time of trial. I desire to appeal this ruling.

Cecil Jones.

Subscribed and sworn to before me this 11th day of March, 1958.

Mary G. Conner, Notary Public, D. C.

My Commission Expires September 20, 1959.

Let transcript of evidence be supplied at cost of United States.

Alexander Holtzoff

Filed March 17, 1958. Harry M. Hull, Clerk.

Let the applicant proceed on appeal without prepayment of costs.

Alexander Holtzoff, Judge.

Filed March 13, 1958. Harry M. Hull, Clerk.

[fol. 120] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Title omitted]

NOTICE OF APPEAL—Filed March 13, 1958

Name and address of appellant: Cecil Jones, 200 19th St. S. E., Washington Asylum and Jail, Washington 25, D. C.
Name and address of appellant's attorney: T. Emmett McKenzie, 412 Fifth Street, N W., Washington 1, D. C.
Offense: Violation of Title 26—4704a and Title 21 174, U.S.C.

Concise statement of judgment or order, giving date, and any sentence.

Appellant sentenced to imprisonment for a period of two to 7 years in penitentiary, March 3, 1958.
Name of institution where now confined, if not on bail: Washington Asylum and Jail, 200 19th Street, Washington 25, D. C.

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from the above-stated judgment.

Cecil Jones, Appellant, T. Emmett McKenzie, Attorney for Appellant.

Date: March 11, 1958.

[fol. 121] In United States District Court for the District of Columbia

Cecil Jones, D.C. D.C. 77322,
200 19th Street S.E.,
Washington, D.C.,
March 24, 1958.

Received March 25, 1958. Harry M. Hull, Clerk

CR # 1022-57

Filed March 25, 1958. Harry M. Hull, Clerk.

Alexander Holtzoff, Judge,
United States District Court,
For the District of Columbia,
Washington 1, D.C.

Sir:

Your Honor, I was sentenced in your Court on March 3, 1958, to a term of seven (7) years, after being convicted for Violation of the Narcotic Act.

I am now asking in writing your Honor to be considered for a reduction of sentence. I ask this so that I may return to my family, to which I am sole support. I feel that if given a chance to return to society I can be a credit to my responsibilities. I no longer feel the desire to par-take in the things cause this present incident. Since my incarceration I can view objectively the antisocial activities that lead to my arrest and conviction.

I ask and pray that I be considered so that can prove to society, my family, my loved ones and above all to myself. that can be a law-abiding citizen.

Respectfully yours, Cecil Jones, 77322.

[fol. 123] Designation of Record—Filed April, 1958.

[Omitted in printing]

[fol. 124] Order Extending Time to File Record on Appeal—May 8, 1958.

[Omitted in printing]

[fol. 125] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 126] [File endorsement omitted]

In the United States Court of Appeals for the District of Columbia Circuit

No. 14,437

Cecil Jones, Appellant,

v.

United States of America, Appellee.

Motion for Hearing of Appeal Before Entire Court and Regard to Date of Argument—Filed August 21, 1958.

Appellant by his attorney moves that this case which has been briefed for Appellant be set down for argument before the entire Court for the following reasons:

1. The case involves questions of importance to the administration of justice and the conduct of the police which the opinions of this Court have left in a state of uncertainty and conflict.

2. The case involves questions on which Court has expressed opinions which misconstrue and do not take due account of applicable opinions of the Supreme Court.

3. The case involves a question as to which this Court has reiterated without adequate consideration a doctrinaire rule which destroys important constitutional rights.

4. The case involves an important question of invoking this Court's discretion to correct a plain error in the Court below.

All of the foregoing points are elaborated in Brief filed with this Court this day.

Counsel further requests that owing to his absence from the country until October 1 this case not be set down for argument until a reasonable time after that date. Counsel further wishes to inform the Court that he has arranged for preparation and filing of any necessary reply brief seasonably during his absence.

Respectfully submitted, Herbert S. Marks.

[fol. 127] CERTIFICATE OF SERVICE

[Omitted in printing]

[fol. 128] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[Title omitted]

Before: Edgerton, Chief Judge, Prettyman, Wilbur K. Miller, Bazelon, Fahy, Washington, Danaher, Bastian, and Burger, Circuit Judges, in Chambers.

ORDER DENYING MOTION—September 12, 1958

Upon consideration of appellant's petition for a hearing en banc and with regard to date of argument, it is

Ordered by the court that petition for hearing en banc be, and it is hereby, denied.

Per Curiam.

Dated: September 12, 1958.

Circuit Judge Bazelon would grant the petition for hearing en banc.

[fol. 129] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,437

CECIL JONES, Appellant

v.

UNITED STATES OF AMERICA, Appellee

Appeal from the United States District Court for the District of Columbia

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Mr. Herbert S. Marks (appointed by this Court) for appellant.

Mr. Walter J. Bonner, Assistant United States Attorney, with whom Messrs. Oliver Gasch, United States Attorney, and Carl W. Belcher, Assistant United States Attorney, were on the brief, for appellee.

Before BAZELON, DANAHER and BASTIAN, Circuit Judges.

OPINION—Decided December 19, 1958

BASTIAN, Circuit Judge: Appellant was indicted, tried and convicted of violation of the federal narcotics laws. (26 U.S.C. § 4704(a); 21 U.S.C. § 174.)

The record shows that on August 20, 1957, Detective Didone of the Narcotics Squad, Metropolitan Police, received reliable information involving appellant in illicit narcotics traffic, and that a ready supply of heroin was being kept in Apartment 36, 1436 Meridian Place, N. W. The next day, August 21, Detective Didone obtained from the United States Commissioner a search warrant cover[fol. 130]ing the above apartment. At approximately 5:00 P.M. on the latter day, the detective and three other officers went to the said premises to execute the search war-

rant. While one officer remained outside the premises, Didone and the other two officers went to Apartment 36 and knocked on the dor. When the occupants failed to open the door in response to knocking, a janitor was summoned to the door at appellant's request. When the janitor spoke to appellant, the door was opened some three or four inches, a night chain being still attached on the inside of the door. Didone thereupon identified himself and told appellant that they had a search warrant for the premises. Appellant immediately turned and went back toward a bathroom. At that point the police officer had plainly identified himself and announced his purpose. Upon being refused admission, and with the door still partly open, Didone pulled the night chain loose, and he and the other officers entered the apartment. Besides appellant, the officers found four known drug addicts in the apartment. A search of the apartment revealed heroin and narcotic paraphernalia (a small package containing three hypodermic needles and syringes, a bottle-top cooker and one tourniquet.) Appellant was placed under arrest.

An indictment was returned against appellant and he (*pro se*) filed a motion to dismiss. This motion alleged that "the place of arrest is not his home although he has stayed there before, which gave no grounds to believe that property not in his possession and not having marks of personal identification, belonged to [appellant]." Thereafter, appellant's assigned counsel filed a motion to suppress evidence. After oral hearing, the District Judge denied the motions, pitching his decision on the ground of lack of standing. Appellant was later tried and convicted. At the trial, the motion to suppress was again urged and rejected. This appeal followed.

Appellant claims that the District Court erred in holding that he had no standing to contest the entry, and urges [fol. 131] that the seizure of the narcotic was unlawful. The Government contends that appellant lacks standing since no right of appellant protected by the Fourth Amendment was violated as he made and makes no claim to ownership or right to possession of the premises or of the seized property. Under the Fourth Amendment, in order for an accused to have standing to prevent the admission of evidence which he thinks was obtained by an unlawful search and

seizure, his personal rights must have been infringed upon. Speaking on this subject in *United States* v. *Jeffers*, 88 U.S.App.D.C. 58, 60, 187 F.2d 498, 500 (1950), *affirmed*, 342 U.S. 48 (1951), this court stated:

> "The constitutional provision against unreasonable searches and seizures does not in terms bar the admission of evidence obtained by its violation. The exclusionary rule as applied in the federal courts was formulated by the judiciary in aid of the effectiveness of the Amendment (citing cases) but is available only to the victim of the unconstitutional conduct. * * * the federal courts in numerous cases, and with unanimity, have denied standing to one not the victim of an unconstitutional search and seizure to object to the introduction in evidence of that which was seized. * * *" (Citing cases.)"

The court went on to reiterate the established rule:

> "* * * the settled doctrine is that objection to evidence obtained in violation of the prohibitions of that [Fourth] Amendment may be raised only by one who claims ownership in or right to possession of the premises searched or the property seized, * * *" [citing cases]." 88 U.S.App.D.C. at page 61, 187 F.2d at page 501.

Unlike Jeffers, who claimed ownership of the property which had been seized unlawfully, even though the premises searched were not his, this appellant has consistently disclaimed ownership of both the property seized and the premies searched. He testified at the hearing on the motion that the property seized was not his and that "the place of arrest is not his home, although he has stayed [fol. 132] there before." He further testified that the apartment belongs to a friend of his, one Arthur Evans, and that Evans gave him the key to the apartment, to use free of charge while Evans was out of town.

Appellant, in his motion to suppress, alleges he was only a guest or an invitee in the apartment. This court has expressly held that a guest in an apartment said to have been illegally entered, and in which no interest is claimed

by the guest, lacks the required standing. *Gaskins* v. *United States*, 95 U.S.App.D.C. 34, 218 F.2d 47 (1955). See also *Washington* v. *United States*, 92 U.S.App.D.C. 31, 202 F.2d 214, *cert. denied*, 345 U.S. 956 (1953); *Gibson* v. *United States*, 80 U.S.App.D.C. 81, 84, 149 F.2d 381, 384 (1945); *Shore* v. *United States*, 60 App.D.C. 137, 49 F.2d 519, *cert. denied*, 283 U.S. 865 (1931). Since appellant's personal rights were not violated, he has no standing to contend that the entry and subsequent seizure were unlawful.

Assuming *arguendo*, however, that we were willing to accept appellant's theory as to his standing, it does not follow that the court should have suppressed the material seized on the premises. The statute[1] permits police to "break open any . . . door . . . part of a house . . . to execute a search warrant if, after *notice* of his authority and purpose, he is refused admittance. . . ." [Emphasis added.] There is abundant evidence, even though it is disputed by appellant, that the officer showed his official identity card through the crack in the door and told appellant he was there to execute a search warrant.[2]

It is not unusual for persons accused to dispute police versions of what occurred on a search, seizure or arrest— [fol. 133] especially when the accused is found in possession of articles like narcotics, which are incriminating *per se*. Like any other fact or credibility question, such dispute must be resolved by the trier of fact upon the testimony. After it has been resolved adversely to the accused, as it was here, it follows logically that he has a heavy burden to persuade an appellate court to the contrary.

Our dissenting colleague agrees that we must accept as true and reliable the testimony of the police; but we cannot agree with him that the Government's version of the case "shows a persistent course of conduct by police to conceal rather than reveal their 'authority and purpose,' and to gain entry without giving any semblance of the notice re-

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[1] 62 STAT. 820 (1948), 18 U.S.C. § 3109 (1952), quoted *infra* in the dissenting opinion.

[2] Thus, cases such as *Woods* v. *United States*, 99 U.S. App.D.C. 351, 240 F.2d 37 (1956), *cert. denied*, 353 U.S. 941 (1957), do not here apply.

quired by statute." We think the police performed their duties properly and in accordance with law. The statute does not call for the vocal announcement "POLICE"; it requires "notice of his authority and purpose." There was neither "fictive compliance" with the statute nor "much too little and much too late," but compliance in every respect. The difference between notice by eye and notice by ear is indeed a thin reed on which to lean, especially where the very proper guilty verdict was based on conclusive evidence.

We have examined the other points raised by appellant and find no error.

Affirmed.

BAZELON, Circuit Judge, Dissenting:

In executing the search warrant, I think the police violated both the letter and the spirit of 18 U.S.C. § 3109, which requires them to give notice of their authority and purpose before breaking into the premises to be searched.[1] Hence, admission of the evidence obtained thereby is reversible error.

[fol. 134] At trial, there was sharp conflict as to the manner in which the warrant was executed. The police testified that they knocked on the door of the third-floor apartment designated in the warrant, but remained mute to the several inquiries of defendant as to who was there; that the defendant then went to the bathroom window and shouted, without response, to the plain-clothes policeman stationed in the street below to bring the janitor because someone was at his door and would not go away; that the janitor was obtained, the police again knocked, and, when inquiry was again made as to who was there, they specified "janitor"; that defendant then opened the door

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[1] 62 STAT. 820 (1948), 18 U.S.C. § 3109 (1952):

> The officer may break open any outer or inner door or window of a house, or any part of a house, or any thing therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

part way; that one of the police officers then placed his wallet identification in the opening of the door and stated he had a search warrant, but pushed his way in when defendant "tore" away towards the bathroom.

Defendant's story differed materially. He testified that instead of remaining mute, the police answered his inquiries of "Who's there" with "Jim, Jack open up"; that when he shouted to the plain-clothes man to get the janitor, the plain-clothes man told him to open the door and see who was knocking; that when he commenced opening the door for the janitor, the police immediately pushed in and only later announced themselves and served the warrant.

Nothing in the record indicates that this conflict in the testimony was either considered or resolved in the court below. For present purposes, I accept the Government's version. It plainly shows a persistent course of conduct by police to conceal rather than reveal their "authority and purpose," and to gain entry without giving any semblance of the notice required by statute. The long-delayed and last-ditch notice described by the police was no more [fol. 135] than fictive compliance. It was much too little and much too late.[2]

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[2] As this court stated in *McKnight* v. *United States*, 87 U.S.App.D.C. 151, 152, 183 F.2d 977, 978 (1950): "To execute the warrant . . . there was no necessity to break open doors; or, what comes to the same thing for legal purposes, none but what the officers themselves created . . . . Neither policemen nor private citizens can justify breaking into a house, or other violence, by deliberately creating an alleged necessity for it."

The holding in the *McKnight* case is not directly applicable to the circumstances disclosed below. The entry in *McKnight* took place pursuant to the putative authority of an arrest warrant, whereas the entry at bar was pursuant to a search warrant and is therefore governed by 18 U.S.C. § 3109. However, in this case as in *McKnight*, had the police officers in the first instance taken those steps which were required, there might have been no necessity for the breaking subsequently ensuing.

See *Gatewood* v. *United States*, 93 U.S.App.D.C. 226, 228,

That defendant had standing to seek suppression of the evidence gained by the illegal entry was settled by this court in *Woods* v. *United States*, 99 U.S.App.D.C. 351, 240 F.2d 37 (1956), *cert. denied*, 353 U.S. 941 (1957), *reversing in part*, *United States* v. *Bell*, 126 F.Supp. 612 (D.D.C. 1955). There we held that standing to raise a § 3109 violation runs not only to the occupant of the premises violated by an illegally forceful entry, but also to those present on the premises when such a violent entry occurs. The majority does not distinguish between standing to suppress evidence obtained by a search or arrest in violation of the Constitution, and standing to suppress evidence obtained through violation of § 3109. Whatever may be the limitations on standing to claim the constitutional privilege, see note 5 *infra*, they are inapplicable to § 3109.

[fol. 136] Although the § 3109 violation was not urged below as a basis for suppressing the evidence, I think the admission is plain error which we are authorized to notice under Rule 52(b), FED.R.CRIM.P.[3] Not only were the circumstances of the entry aggravated, but the sole evidence upon which conviction could have been based was obtained as a result of the illegal entry. We are not advised why this issue was not raised at trial by counsel assigned below (as distinguished from present counsel appointed by this court). But I submit that it may be related to counsel's statement to the trial court that he was too burdened at the time of trial properly to prepare his case and that he had misgivings about the adequacy of his presentation.[4]

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209 F.2d 789, 791 (1953), where, citing *Gouled* v. *United States*, 255 U.S. 298 (1921), this court again declared: "Entry by stealth can, of course, be as unlawful as entry by illegal use of force." And see *Miller* v. *United States*, 357 U.S. 301 (1958); *Accarino* v. *United States*, 85 U.S.App.D.C. 394, 179 F.2d 456 (1949).

[3] See, *e. g.*, *Pinkard* v. *United States*, 99 U.S.App.D.C. 394, 240 F.2d 632 (1957); *Simmons* v. *United States*, 92 U.S. App.D.C. 122, 206 F.2d 427 (1953); *Tatum* v. *United States*, 88 U.S.App.D.C. 386, 190 F.2d 612 (1951).

[4] "Finally, I want it put in the record that since this is an assigned case that I have been almost every day in this Court. This fellow is confined in the jail and I can visit him

Since I think the evidence must be excluded because of the illegal execution of the search warrant, I find it unnecessary to consider the validity of the warrant and defendant's standing to challenge its validity.[5]

[fol. 137] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, SEPTEMBER TERM, 1958

Criminal 1022-57

No. 14,437

CECIL JONES, Appellant,

v.

UNITED STATES OF AMERICA, Appellee

Appeal from the United States District Court for the District of Columbia

Before: Bazelon, Danaher and Bastian, Circuit Judges

JUDGMENT—December 19, 1958

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

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from nine until three, and from nine until three I was up here so if I did not have a better preparation or more requests, I have had no opportunity."

And, although defense counsel had argued a motion in the case several weeks prior to trial, there exists on the record his unexplained statement, made at the end of the trial: "I certainly did not know anything about this case until yesterday afternoon."

[5] On the question of standing, cf. my dissenting opinion in *Christensen* v. *United States*, —— U.S.App.D.C. ——, ——, 259 F.2d 92, 193 (1958). In this regard, I note in passing that the trial judge considered himself bound by the pretrial decision on the motion to suppress. But see *Gouled* v. *United States*, 255 U.S. 298, 313 (1921).

On consideration whereof It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause be, and it is hereby, affirmed.

Per Circuit Judge Bastian.

Dated: December 19, 1958.

Separate dissenting opinion by Circuit Judge Bazelon.

[fol. 138] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,437

[Title omitted]

PETITION FOR REHEARING AND RENEWAL OF MOTION FOR HEARING BEFORE ENTIRE COURT—Filed January 2, 1959

1. Appellant, by his Court assigned attorney, petitions this Court, which affirmed his conviction in a two to one opinion December 19, 1958, to grant petition for rehearing for the following reasons:

Putting to one side arguments made in behalf of appellant in Brief and Argument, appellant draws to the attention of this Court a mistake which appears in the majority opinion and which may have seriously and adversely affected the decision of the Court. The mistake of the majority opinion related to the question of execution of search warrant by police officers through which the only possible incriminating evidence was obtained.

The opinion states "There is abundant evidence, *even though it is disputed by appellant*, that the officer showed his official identity card through the crack in the door and told appellant he was there to execute a search warrant". (Emphasis supplied). Opinion p. 4.

The opinion continues "It is not unusual for persons accused to dispute police versions of what occurred on a

search, seizure or arrest—especially when the accused is found in possession of articles like narcotics, which are incriminating per se". Opinion pp. 4-5.

[fol. 139] It is at this point that the majority of the Court overlooked important circumstances in the record below. The mistake is reflected in the following passages of the Court's opinion. "Like any other fact or credibility question, such dispute must be resolved by the trier of fact upon the testimony. After it has been resolved adversely to the accused, *as it was here*, it follows logically that he has a heavy burden to persuade an appellate court to the contrary." (Emphasis supplied). Opinion p. 5.

The truth is, as the record below establishes, that the disputed facts concerning the execution of the search warrant were never even considered below, let alone resolved against appellant.

As the majority opinion did recognize, the motions judge below denied pre trial motion to suppress "pitching his decision on the ground of lack of standing". Opinion p. 2. At this stage in the case below, the disputed facts concerning *execution* of the search warrant were not before the motions judge at all.

At the outset of the trial, when the pre trial motion to suppress was renewed, the trial judge said "It is my view of the law that the decision on the motion to suppress is binding on the trial judge *so I cannot review the matter.* (Emphasis supplied). However, the defendants rights are protected because if the defendant is convicted and desires, to appeal, he can assign as error on the appeal the denial of the motion to suppress". (J.A. 23).

Subsequently in the course of the trial, incidental cross-examination of government witnesses and direct and cross-examination of appellant elicited the dispute concerning execution of the warrant. But this dispute at the trial was at least in essential part irrelevant to any issue relating to [fol. 140] the commission of crime. Hence the jury had no occasion to pass upon the dispute and in any event the dispute related to a matter outside the province of the jury and within the province of the motions judge or trial judge. As the foregoing statement establishes, neither

the motions judge nor the trial judge ever passed upon this dispute.

Even the majority opinion in this case indicates that had the dispute in question been resolved in favor of appellant, *Woods* v. *United States*, 99 App. D. C. 351, 240 F. 2d. 37 (1956); cert. denied, 353, U.S. 941 (1957) would have led to a reversal. (Opinion p. 4, footnote 2).

Thus, the mistake in the majority opinion concerning the procedural question of whether or not disputed facts had been resolved appears to have had a seriously prejudicial effect on the outcome of the case for the appellant.

2. In the alternative, appellant renews his motion of August 21, 1958 for a hearing of this case before the entire Court for reasons which have been reinforced since that motion was denied.

One of the decisive factors in the opinion of the majority adverse to appellant was that because he was a so-called guest in premises which were subjected to an allegedly illegal search and seizure, he had no standing to move to suppress in order to protect his rights under the Fourth Amendment. Certain opinions of this Court have held that a guest does not have standing to move to suppress in the absence of a claim by him to the property seized, and these cases are cited in the majority opinion. Opinion p. 4. But these cases are logically in conflict with other decisions of this Court, notably *United States* v. *Blok*, 88 App. D. C. 326, 188 F. 2d. 1019 and *Woods* v. *United States*, *supra*. In *Blok* an accused was given standing [fol. 141] despite the fact that she had no interest in the premises and denied any interest in the evidence seized. Moreover, since motions to suppress whether for violation of the Fourth Amendment or for violation of 18 U.S.C. 3109 are both made under Federal Rules of Criminal Procedure, Rule 41 (e), there is no rational basis for distinguishing the allowance of a standing to move to suppress by a guest as in *Woods* (Which involved 18 U.S.C. 3109) and cases involving the Fourth Amendment. Review by the entire Court is required to resolve the conflict in its decisions in this important matter of criminal procedure.

In support of such review, it should be noted that the Supreme Court has expressly held, notwithstanding decisions of lower courts to the contrary, that the standing

of a guest to move to suppress is open. *McDonald* v. *United States*, 335 U.S. 451, 456, 69 S. Ct. 191, 193 (1948). Three of the concurring Justices of the Supreme Court in McDonald clearly regarded a guest as having sufficient standing to move to suppress. See 335 U.S. at 457, 461, 69 S. Ct. at 194, 196.

In any event, the consequences of the guest rule—which has no basis in logic, since a guest is just as much a direct victim of an illegal search as any other—are to require the guest to claim an interest in the incriminating property in order to establish standing under the Fourth Amendment which in turn has the effect of impairing his rights under the Fifth Amendment not to incriminate himself. In short, if the majority opinion in this case stands, a guest is placed in the untenable position of giving up his rights under the Fourth Amendment in order to preserve those under the Fifth or *vice versa*. Cf. Edgerton, J. dissenting in *Wilkins* v. *United States*, decided by this Court April 10, 1958.

[fol. 142] A further point of significance rarely noticed by this or any other court in cases such as this is the fact that at all times from the beginning to the end of the case, the Government contends that the accused is guilty of the very essence of the crime—"possession" of the incriminating evidence. That circumstance alone—namely the Government's consistent contention of possession by the accused, should give him standing to move to suppress even though he is a guest and disclaims possession, i.e. guilt. *United States* v. *Dean*, 50 F. 2d. 905 (D.C.D. Mass. 1931); Bazelon, Circuit Judge, dissenting in *Christianson* v. *United States*, decided in this Circuit August 28, 1958. Cf. *Williams* v. *United States*, 99 U.S. App. D. C. 161, 237 F. 2d. 789 (1956).

Standing to move to suppress was essential to the defense in this case since the evidence to convict was slim and all of it was obtained through a search warrant both the validity and execution of which was open to serious question.

Respectfully submitted, Herbert S. Marks.

Certificate of Service and Good Faith

I certify that copies of the foregoing Petition for Rehearing and Renewal of Motion for Hearing Before Entire Court were delivered this 2nd day of January 1959 to the office of Carl W. Belcher, Esq., Assistant United States Attorney, Chief of the Appellate Division, United States Court House, Washington 1, D. C., and mailed to appellant, Mr. Cecil Jones, Reg. No. 18624, Box 25, Lorton, Virginia.

I further certify that upon study of the Court's opinion in this case dated December 19, 1958, I advised appellant [fol. 143] that this case involves substantial question of law and that it would not be frivolous to seek a rehearing. Appellant thereupon requested counsel to pursue further remedies in his behalf. I certify that this Petition and Motion is prepared in good faith and not for delay.

Herbert S. Marks.

[fol. 144] [File endorsement omitted]

In United States Court of Appeals for the District of Columbia Circuit, September Term, 1958

[Title omitted]

Before: Prettyman, Chief Judge, Edgerton, Wilbur K. Miller, Bazelon, Fahy, Washington, Danaher, Bastian and Burger, Circuit Judges, in Chambers

Order Denying Hearing Before the Entire Court—January 20, 1959

Upon consideration of appellant's renewal of his motion for a hearing before the entire court, it is

Ordered by the court that the renewal of appellant's motion for a hearing before the entire court is denied.

Per Curiam.

Dated: January 20, 1959.

[fol. 145] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, SEPTEMBER TERM, 1958

[Title omitted]

Before: Bazelon, Danaher, and Bastian, Circuit Judges, in Chambers

ORDER DENYING PETITION FOR REHEARING—January 20, 1959

Upon consideration of appellant's petition for rehearing, it is Ordered by the court that the petition for rehearing is denied.

Per Curiam.

Dated: January 20, 1959.

Circuit Judge Bazelon would grant the petition for rehearing.

[fols. 146-147] DESIGNATION OF RECORD—Filed January 23, 1959

[Omitted in printing]

[fol. 148] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 149] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1958

No. 627 Misc.

CECIL JONES, Petitioner,

vs.

UNITED STATES

On petition for writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI —May 18, 1959

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 931.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE 1959

FILE COPY

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 69

CECIL JONES,

Petitioner,

—v.—

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONER

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INDEX

SUBJECT INDEX

BRIEF FOR PETITIONER

CITATIONS:

CASES: Page

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 69

CECIL JONES,

Petitioner,

—v.—

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONER

Opinion Below

The opinion of the Court of Appeals for the District of Columbia Circuit and the dissent are reported at 262 F.2d 234 and 237; they are also printed in the Record (R. 82 and 86).

Jurisdiction

The judgment of the Court of Appeals was entered on December 19, 1958 (R. 90-91). Petition for rehearing was filed on January 2, 1959 and, the same judge again dissenting, denied on January 20, 1959 (R. 95). Motion for Leave to Proceed in Forma Pauperis and Petition for Certiorari were filed in this court on February 18, 1959 and motion and petition were granted May 18, 1959 (R. 96). The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

Questions Presented

1. Whether a defendant in a criminal case who seeks the exclusion of evidence on the ground that it was obtained by unlawful search and seizure must establish standing to suppress or exclude the evidence on the basis of an interest in the premises searched or the property seized.

2. Whether a defendant had standing to suppress or exclude the evidence on which his conviction rested on the ground that these materials were obtained by unlawful search and seizure in an apartment lawfully occupied by defendant with the consent and in the absence of the apartment holder.

3. Whether a defendant had standing to suppress or exclude the evidence on which his conviction rested on the ground that these materials were obtained by unlawful search and seizure, where "possession" of these materials was the crux of the crime with which he is charged; where the search warrant named defendant as occupant of the apartment searched and where the Government maintained throughout that the defendant was the occupant of the premises and "possessed" the materials; where the premises on which the materials were found were in the defendant's lawful control; and where the Government introduced testimony alleging that the defendant had admitted both that he was living in the apartment at the time in question and that materials seized were his property.

4. Whether an affidavit based entirely on information from an unidentified informant alleged to have given correct information "on previous occasion," and from unidentified other "sources of information," without any personal investigation or any relevant corroborating knowl-

edge by the affiant police officer, established "probable cause" for the issuance of a warrant.

5. Whether the police in carrying out a search adequately complied with the requirement that they inform the occupant of their identity and purpose and wait for the occupant to refuse to admit them before using force to enter.

Constitutional Provisions, Statutes and Rule Involved

As to Search and Seizure:

U.S. Constitution, Amendment IV—

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Federal Rules of Criminal Procedure, Rule 41(e)—

Motion for Return of Property and to Suppress Evidence. A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything obtained on the ground that . . . (2) the warrant is insufficient on its face, or . . . (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to sup-

press evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearings unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

18 U.S.C. 3109.

[Act of June 25, 1948, C. 645, 62 Stat. 820]—

The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

As to Conviction Below:

26 U.S.C. Sec. 4704(a).

[Act of August 16, 1954, C. 736, 63A Stat. 550, amended Aug. 21, 1954, C. 1147, Sec. 8, 68 Stat. 1004]—

(a) General requirement.—It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found.

21 U.S.C. Sec. 174.

[Act of Feb. 9, 1909, C. 100, Sec. 2(c), 135 Stat. 614; Jan. 17, 1914, C. 9, 38 Stat. 275; May 26, 1922, C. 202, Sec. 1, 52 Stat. 596; June 7, 1924, C. 352, 43 Stat. 657; amended Nov. 2, 1951, C. 666, Secs. 1, 5(1), 65 Stat. 767; June 18, 1956, C. 629, Title I, Sec. 105, 70 Stat. 570]—

Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under Section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

Statement

Petitioner was convicted after jury trial of violating narcotic laws and received a lengthy jail sentence. The only evidence against defendant consisted of items obtained during a search of certain premises where Petitioner was found and arrested. All the proceedings, from trial through appeal, have been *in forma pauperis*.[1]

[1] Assigned counsel defended Petitioner in the District Court (R. 12-13, 27, 73-74). After trial, the trial judge granted an order for appeal *in forma pauperis* (R. 77). The Court of Appeals assigned new counsel in that Court for the proceedings there (262 F.2d at 235; R. 82, 88); the same counsel in association with another member of the Bar of this Court, filed the petition for certiorari and is continuing in this proceeding.

The key issues in the case are whether the courts below erred (1) in refusing to consider on their merits motions to suppress and efforts to exclude evidence obtained through search and seizure, (2) in failing to find absence of "probable cause" for the search warrant, (3) in failing to find violation of 18 U.S.C. 3109 in carrying out the search and (4) in the case of the Court of Appeals, in mistakenly finding that the question of violation of 18 U.S.C. 3109 had been resolved adversely to Petitioner "by the trier of fact."

On August 21, 1957 a District of Columbia police officer of the narcotic squad swore out an affidavit in support of a search warrant covering a third floor apartment at 1436 Meridian Place, N.W., Washington, D. C. The affidavit stated that the apartment was "occupied by" Petitioner and a girl named Richardson (R. 3). The affidavit further stated that the officer received information in the late afternoon of August 20 that Petitioner and Richardson were involved in illicit narcotic traffic and kept a ready supply of heroin as well as narcotics paraphernalia in the apartment (R. 3).

In response to the policeman's affidavit, a United States Commissioner, also on August 21, 1957, issued a warrant for search and seizure. The warrant authorized search of the apartment (referred to it as "occupied by Cecil Jones and Earline Richardson") and seizure of narcotics and paraphernalia there (R. 1-2). A group of policemen broke into the apartment the same day (R. 2, 36-37).

When they broke in they found Petitioner, Richardson and four others there and took them into custody (R. 38, 46). The police also found one capsule containing about 1.2 grains of heroin, quinine hydrochloride and milk sugar together with crude paraphernalia used in administering narcotics (R. 2, 37-38, 58). The police claimed that all

present in the apartment were users of narcotics (R. 3, 46). There was no evidence in the case of any kind that any of the six had ever been involved in the drug traffic.[2]

On August 22, a police officer directed a complaint against Jones saying "that he did unlawfully possess a narcotic drug" on or about August 21 (R. 5). Bail for Petitioner was fixed at $3,500.00 in a "Final Commitment" describing Jones's offense as unlawful possession of narcotics; Petitioner failed to make bail and has been in prison ever since he was arrested at the time of the search (R. 6 and 38). Of the five others in the apartment at the time of the raid, the girl, Richardson (always referred to by the police along with Petitioner as "co-occupant") was originally charged with violation of the Harrison Narcotic Act (R. 38); so far as appears she was never prosecuted. Three of the others were charged with vagrancy; the remaining person present, another girl, was booked for investigation and later released (R. 46). The Record does not explain why Petitioner was singled out for prosecution for the serious offense of trafficking in narcotics.

On October 31, 1957 a Grand Jury returned a two-count indictment against Petitioner; the first count that on or about August 21, 1957 Petitioner purchased, sold, etc., not in the original stamped package a narcotic drug, "that is, one capsule containing a mixture totaling about 1.2 grains of heroin hydrochloride, quinine hydrochloride and milk sugar"—in violation of 26 U.S.C. 4704a; the second count, that on the same date Petitioner facilitated the concealment and sale of a narcotic drug, "the same heroin hydrochloride which is mentioned in the first count of this indictment," in violation of 21 U.S.C. 174 (R. 7-8).

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[2] Petitioner, age 31 at the time of the trial, had no previous criminal record except a sentence, ten years earlier in 1948, for receiving stolen goods (R. 26-27, 65).

On November 12, 1957, Petitioner filed *pro se* a motion from jail to dismiss the indictment (R. 9). That day he also executed a so-called affidavit for leave to proceed in "Former Pauperis." The next day he filed an affidavit in proper form to proceed without prepayment of costs which appears to have been granted promptly (R. 12-13).

Thereafter a court appointed counsel appeared for Jones, disavowed Petitioner's *pro se* motion to dismiss (R. 21) and it was denied (R. 15).

On November 26, 1957, Jones's counsel filed a timely pre-trial motion to suppress the evidence obtained in carrying out the search and seizure on the ground that the warrant revealed on its face that it was illegal. The motion, as amended, stated that Jones was present in the premises concerned on the date of search as "invitee or guest" (R. 13-14, 22).

The Government, on pre-trial argument of the motion to suppress urged that the earlier *pro se* motion to dismiss represented a disclaimer by Petitioner of a sufficient interest in the premises searched to give him standing to move to suppress (R. 21-22). The Government argued that in any event Petitioner's motion to suppress had to be dismissed because he failed affirmatively to claim the necessary interest in the premises searched or the property seized (R. 21-22).

Thereupon counsel put Petitioner on the stand during the pre-trial hearing "for the sole purpose" of showing standing to move to suppress (R. 23). Petitioner then testified that he and the apartment-holder, one Evans, were friends; that, during the week of August 20, 1957, the lessee, Evans, had gone to Philadelphia for "about five days"; that Evans gave Jones "a key" to the apartment and the "use of" it during his absence; that Jones did make some use of it during that time, including sleep-

ing there "maybe a night"; and he had a suit and a shirt there. Jones did not pay rent for the apartment and made no claim that it was his home. His home was with his parents at another address where he contributed to the rent (R. 24-26).

The prosecutor by the nature of his questions and argument during these pre-trial proceedings constantly made Petitioner aware of the danger he ran of incriminating admissions tending to show possession of narcotics, the crux of the crime charged, if he claimed a larger interest in the premises or any interest in the items sought to be suppressed (R. 22, 24-26).

On December 20, 1957, the District Judge denied the pre-trial motion to suppress, obviously "pitching his decision on the ground of lack of standing" in that Petitioner was only a guest in the apartment and failed to claim a sufficient interest in the premises searched or the items obtained by the search (R. 31-32, 83).

Jones came to trial on January 31, 1958 before a different judge and jury. At the beginning of the trial counsel renewed his motion to suppress again disavowing the motion to dismiss (R. 33). [The word "codicil," R. 33, should read "contraband."] The trial judge, without considering the merits of the motion to suppress, denied it on the ground that he was bound by his colleagues' earlier decision at pre-trial (R. 33).

The trial proceeded and the Government presented its case. On the afternoon of the search, the group of police who made it stationed a plain-clothes man—a stranger to Jones (R. 63, 65)—at a position below where he could see "the window" of the apartment to be searched (R. 36). The rest went up to the apartment door and knocked (R. 36-37). The police lookout in the street testified he heard the knocking three floors up, that a man came to

the window above him and called down "that someone was knocking on *his* door and to call the janitor" [emphasis supplied] (R. 52). One of the police outside the door of the apartment testified he heard Jones say at this time "Call the janitor, there is someone at *my* door and he won't go away" [emphasis supplied] (R. 37). The lookout in the street also testified he saw the man in the window "putting his hand on the awning [above the window] which seemed to have a bird's nest in it" (R. 52). Later the police lookout from the street joined his fellow officers in the apartment and identified Jones as the person in the window (R. 38). During the search, the police officers who broke in testified that they found in a bird's nest in an awning outside the window—where Jones had been seen—the single heroin capsule and the crude narcotics paraphernalia (R. 38). A police officer testified that during the search Jones "admitted" to him that the heroin capsule and some of the paraphernalia "was his" (R. 38); he testified also that Jones admitted that he and Earline Richardson were "living there" that is "in the apartment [which] had originally belonged to Arthur Evans who was in Philadelphia" (R. 50).

At the conclusion of the Government's case against Jones, counsel renewed his objection to evidence seized at the apartment and this objection was again denied (R. 56; refer also to R. 39 for identification of the evidence objected to).

Thereafter the defendant took the stand in his own behalf and denied all the charges (R. 58-60). He disputed the testimony of the police officers against him, including the alleged admissions and that he had put his hand on the awning outside the bathroom window, he had not put his hand on the awning at the time he called for help to the stranger below, he "had to hold the window up" because "it would not stay up of its own accord" (R. 59).

The jury brought in a verdict against Jones on both counts. He was subsequently sentenced on the first count to imprisonment for a period of two years four months to seven years, on the second count, seven years, the sentences to run concurrently (R. 75).

Issues not considered by the trial court.—Before this court in this proceeding are two questions which were not considered by the trial court: the adequacy of showing of probable cause to support the search warrant; and the lawfulness of the manner in which the search was carried out.

The only support for the search warrant was the police affidavit (R. 1, 3). That affidavit contains an assertion of affiant police officer that he received information late in the afternoon of August 20, 1957 that Petitioner and Richardson were involved in illicit narcotic traffic and kept a ready supply of heroin on hand in the apartment occupied by them. The affidavit does not disclose who supplied the information; it says simply "the source of information also relates that the two aforementioned persons kept these same narcotic drugs either on their person, under a pillow, on a dresser or on a window ledge in said apartment. The source of information goes on to relate that on many occasions the source of information has gone to said apartment and purchased narcotic drugs from the above-mentioned persons and the narcotics were secreated [sic] in the above-mentioned premises, the last time being August 20, 1957." The affidavit says that the same information regarding illicit narcotic traffic conducted by Petitioner and Richardson has been given to the affiant and other police officers by other sources of information. Nothing else is said with respect to the "other sources of information." As to the source of information received the afternoon of August 20, the affidavit recites merely that this source "has given information to the

'affiant' on previous *occasion* and it was correct" [emphasis supplied] (R. 3). The only other feature of the affidavit is the statement that "both the aforementioned persons [Petitioner and Richardson] are familiar to the undersigned and other members of the narcotic squad of the District of Columbia Police Force. Both have admitted to the use of narcotic drugs and display needle marks as evidence of same" (R. 3).[3]

The detailed infirmities of the affidavit in relation to probable cause are appropriately left to the argument. But a few of the more important facts should be mentioned at once. The informants were not disclosed, no affidavits by them were supplied to the United States Commissioner, the failure to supply such affidavits was not justified by any suggestion that these were confidential sources; nor was there any suggestion of flight or anticipated early diversion of narcotics to justify failure to make independent police investigation; there was, in fact, no independent investigation of any kind by the police—not even independent inquiries that might have linked defendant to the apartment. There has been no explanation of how familiarity of the persons named in the affidavit to the police and their alleged admission to the use of narcotic drugs and evidence of needle marks are relevant to the issue of probable cause for the warrant. Unlike cases where police expertise with underworld occupations and those engaged in them are asserted in trying to establish probable cause, there were no such assertions in this case respecting Petitioner or anyone else; there was nothing in the police affidavit to associate the apartment or Petitioner with traffic in narcotics except the alleged tips.

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[3] Later on in the trial affiant seems to be saying he based these remarks on what others had told him, not on what he knew (R. 46).

On the matter of breaking into the apartment, it developed at the trial that there was a dispute between Petitioner and the police concerning the manner of entry.

The police gave the following version: When they first knocked on the apartment door "about 5:00 P.M." on the afternoon of August 21, 1957, Petitioner called out to them "whose there," and they "remained moot" [sic] (R. 36-37). The police knocked again, Petitioner again called "whose there" and the police again "remained moot" [sic] (R. 37). Petitioner then went to the bathroom window and "yelled down" to the unknown bystander (R. 65) who turned out to be the plain-clothes man stationed below as a lookout (R. 36). As observed earlier, this officer testified he "could hear a knocking from the building" three floors up and Jones said, according to that officer, "that someone was knocking on his door and to call the janitor" (R. 52); and one of the policemen stationed outside the door of the apartment testified he heard Jones say at this time, "Call the janitor, there is someone at my door and he won't go away" (R. 37). The police outside the door all the while "remained moot" [sic] (R. 26). The janitor was brought to the apartment, whether as a result of Jones's call to the plain-clothes man in the street or because the police at the apartment door sent for him is not disclosed by the testimony (cf. R. 37). When the janitor came, he knocked on the door and identified himself to Jones; the police meanwhile continued to "remain moot" [sic] (R. 37). Jones recognized the janitor's voice (R. 64) and opened the door part way leaving the chain lock on. The police officer who broke in testified that at that moment he had his "wallet open with identification exposed and I placed this inside the door saying I had a search warrant for the premises" (R. 37). The officer continued his testimony, "this defendant who had opened the door and was standing di-

rectly behind the partially open door there tore and went straight back to the bathroom. Then seeing he was refusing me entrance, I placed my hand on the chain and pulled and the night chain slipped loose" (R. 37).

From the time of the first police knock at the door, "about 5:00 P.M." (R. 36, 62) until the break-in, there was evidently an interval of about three quarters of an hour (see R. 2).

Petitioner's version of the police raid was that it began with knocking on the door "not an ordinary knock, it was deliberate pounding as if they wanted to break in the door" (R. 62). To his repeated requests to know who was there the responses were "it is Jack, Jim, open the door Cecil" (R. 58, 62, 63). He did not open the door because he knew no Jim, Jack and whoever it was seemed to want to break in (R. 62). Instead Jones called to the apparent stranger in the street to get the janitor. The stranger who was the plain-clothes man lookout called up to Jones "open the door and see who it is" (R. 58). Later, when the janitor knocked and identified himself, Petitioner began opening the door which, with the chain night latch, had three locks (R. 58). He opened two of the locks but before he could unfasten the chain lock, a policeman broke it (R. 59). Concerning the actual break-in, Jones testified during cross-examination at the trial:

> Q. When you unlocked the door, will you tell us why you didn't unlock the chain?
>
> A. I didn't have time, the officer snatched the door.
>
> Q. How do you know?
>
> A. Officer Didone was the first man in the door and said "the police" and grabbed me around the neck. He didn't have anything in his hand, he just pulled the door open and grabbed me around my neck and said "police."

Q. Which hand did he grab you around the neck with?

A. I can't say.

Q. He didn't grab you with both hands?

A. No, sir, one hand.

Q. What was in his other hand?

A. I didn't see anything, sir, he was pushing me (R. 65).[4]

Although trial counsel had moved to suppress and later objected to admission of the evidence, the basis of his objection was the validity of the warrant. He did not challenge the legality of the manner in which the warrant was carried out. The disputed facts as to whether or not the police gave Petitioner notice of their purpose and authority before they broke in therefore were not the subject of argument by counsel before the trial judge on the issue of admissibility of evidence. In the Court of Appeals, newly assigned counsel argued the evidence should have been excluded for the additional reason that the police had not given requisite notice of purpose and authority before breaking in contrary to 18 U.S.C. 3109. Counsel therefore urged that evidence seized in the raid could not be considered against defendant and that failure to dispose of this point in the trial was plain error which the Court of Appeals should consider even though not made in the District Court.

The Court of Appeals did consider the point. The majority held, however, that Petitioner had no standing to move to suppress but, *arguendo*, if he did the dispute regarding the manner of police entry had been resolved adversely to the Petitioner at the trial by "the trier of

[4] Of course Petitioner's version and that of the police were in agreement at most points. The main disagreement was Petitioner's denial that the police gave notice of purpose and authority before breaking the chain lock.

fact." The facts, as thus determined, the majority said, did not reveal any violation of 18 U.S.C. 3109 (R. 85-86).

The dissent in the Court of Appeals, by Judge Bazelon, pointed out that the majority was mistaken in saying that the dispute concerning the manner of entry had been considered and resolved in the District Court (R. 87). It had never been considered at all in the District Court by judge or jury. Virtually all the testimony about it was irrelevant to the question of guilt or innocence, the only issue before the jury. So the jury could not have resolved this dispute; the trial judge could not have resolved the dispute because, the point was not argued, he never referred to it and he seems at all times to have felt that the pre-trial Judge's decision on standing precluded his considering such matters (R. 33, 56).

The dissenting judge thereupon viewing the facts, *arguendo*, most favorably to the police concluded that even on their own testimony there was failure to comply with the requirements of disclosure of authority and purpose before forcible entry (R. 87), and that it was plain error not to exclude evidence of the items obtained through such an unlawful search (R. 88). In this connection Judge Bazelon's dissent said that even accepting the Government's version of the dispute, "It plainly shows a persistent course of conduct by the police to conceal rather than reveal their 'authority and purpose' and to gain entry without giving any semblance of the notice required by statute" (R. 87).

Neither majority nor dissent in the Court of Appeals considered the question of probable cause. The majority said nothing about it; the dissent concluded that Jones had standing under District of Columbia precedent at least for purposes of invoking 18 U.S.C. 3109, that the evidence was excludable because obtained in violation of 18 U.S.C.

3109, hence there was no need to consider the issue of probable cause for the warrant (R. 88-89).

Summary of Argument

I.

The Supreme Court has not yet had to decide whether the rule of *Weeks* v. *United States* excluding evidence obtained by unlawful search and seizure can be invoked by one who is not himself the victim of the unconstitutional search. While the lower federal courts have developed a requirement of "standing," it has been urged with increasing vigor that such requirement is inconsistent with the spirit and purposes of the *Weeks* rule, and there is basis for argument that at least in regard to unlawful search of dwellings the standing requirement should be rejected. Such requirement has diluted the rule of *Weeks* and defeated the oft-expressed purpose of this Court to preserve constitutional rights, deter the police from lawless action and keep tainted evidence out of the federal courts.

II.

Even assuming, as lower federal courts require, that in order to suppress evidence obtained pursuant to an unlawful search warrant a defendant must have "standing," the defendant in this case should have been held to have the necessary standing at all times. Jones, in the absence of the owner, was lawfully in possession and control of the premises searched, whether he be called guest, invitee or licensee. It was up to him to maintain the privacy of that apartment while the apartment holder was away. He was the "victim" of the search and he was the "person aggrieved" who should have the right to challenge unlawful searches and seizures under Rule 41(e) of the Federal Rules of Criminal Procedure.

Further, the search warrant named defendant as occupant of the apartment and possessor of the narcotics: various other pre-trial, Government documents also expressly named him as occupant of the premises and possessor of the drugs. These circumstances also should give him "standing."

Moreover, in a case where the crux of the crime with which defendant is charged is "possession" of narcotics, the prosecution ought not to be able both to insist that defendant possessed the narcotics in its efforts to convict him of crime and at the same time challenge his right to suppress on the ground that he did not have or claim possession. The Government should not be permitted in effect to compel the defendant to claim possession and admit the crime which that constitutes in order to obtain suppression of the materials unlawfully seized. The defendant should not be required to incriminate himself in order to vindicate his rights under the Fourth Amendment. To impose this on the defendant is to hold that in cases where "possession" constitutes a crime, a defendant does not in fact enjoy all his usual constitutional protections, but must choose between his rights of privacy under the Fourth Amendment and his privilege against self-incrimination under the Fifth Amendment; indeed as a practical matter such imposition on defendants may nullify their rights under both the Fourth and Fifth Amendments.

Whatever the merits of the decisions below on defendant's standing to make the original pre-trial motion to suppress, error should be found in the overruling of the objection to admission of the evidence obtained from the search when the objection was renewed at the trial at the conclusion of the Government's evidence. By that time the Government had presented testimony to the effect that the defendant was both in charge of the premises and in

possession of narcotics. The Government's testimony went so far as to allege an admission by Jones that he lived in the apartment and owned materials seized.

Decisions of this Court require that when such circumstances develop at trial on the basis of the Government's own case the challenged evidence should be excluded then and there.

III.

The Court of Appeals in effect affirmed that Jones had no standing to challenge the validity of the warrant, and like the District Court, it did not consider whether the warrant was valid. Since that question depends entirely on the sufficiency of the police affidavit, which is before this Court, and particularly since the defendant is presently in prison pursuant to conviction solely on the basis of the evidence obtained pursuant to the challenged warrant, the Supreme Court should itself decide whether the warrant was valid.

Defendant urges that the warrant was not valid. There was nothing before the Commissioner which would establish "probable cause" that the defendant was in unlawful possession of narcotics in the apartment in question, or that there were any narcotics there. The affidavit by the police officer to the Commissioner alleged no relevant information about the apartment or about the defendant, of his own knowledge, but only tips from unnamed and unidentified informers. The principal informant was alleged to have given information "on previous occasion and which was correct," but this may well mean just one occasion, which is hardly enough to establish reliability; it is not even clear from the affidavit whether the informant may have given information on other occasions which was not correct. There was no examination of the alleged informers by the Commissioner, no affidavit from

them, no other information about them, nor any examination of the police by the Commissioner about the informants or about any other matter related to the warrant Contrary to standard police practice, the police mad no investigation pursuant to the information received, there was no suggestion of flight, no suggestion of any expected diversion elsewhere of narcotics to justify or explai the police failure to do more than they did. The affian officer did not assert anything he saw or heard or knew which was relevant to corroborate the tip, or even t connect defendant with the apartment which was to be searched. The assertion in the affidavit that defendant was "familiar" to affiant and other police officers and had "admitted to the use of narcotic drugs and" displays "needle marks as evidence of same" are circumstances irrelevant to probable cause for search of the apartment

IV.

A separate and additional ground for excluding the crucial evidence is Petitioner's claim that the search was conducted in violation of the federal law requiring the police to identify themselves and state their purpose before breaking in. 18 U.S.C. 3109.

Even if it be assumed that the same standing is required to object to evidence obtained in violation of this express statute as in violation of the Fourth Amendment, it should be held that Jones had standing to object to the method of execution of the warrant. In the absence of the owner, he was in charge of the apartment which was the object of the warrant and of the search pursuant to it. The police did not comply with 18 U.S.C. 3109, even on their version of disputed facts, since in carrying out the warrant they failed for a substantial period to identify themselves and state their purpose but instead attempted by ruse

and trickery to get the defendant to admit them without knowing their identity and their purpose.

Finally, should it be held that the police ruse did not violate 18 U.S.C. 3109, there is an unresolved dispute as to whether the police did in fact identify themselves and declare their purpose before they broke in, as required by the statute. As a minimum, the case should be reversed and remanded for a finding of fact on this point.

ARGUMENT

I.

The Defendant Should Be Allowed to Challenge the Validity of the Search Warrant Regardless of "Standing"

When assigned counsel for the defendant made the pre-trial motion to suppress because the search warrant was illegal on its face, the District Judge refused to consider the merits of this argument. Apparently his view was that Jones lacked "standing" because defendant was a mere guest and did not affirmatively claim any greater interest in the premises searched or any interest in materials seized there (R. 16-17, 21-22, 27, 30-32, 83). Motions during the trial to exclude and objections to admission of the questionable evidence were rejected by the trial judge who evidently felt himself bound at all times by the pre-trial decision on the motion to suppress (R. 33, 56).

Although the rule established in 1914 in *Weeks* v. *United States*, 232 U.S. 383, excluding evidence obtained in violation of the Fourth Amendment, has been before this Court on numerous occasions, the Court has never been required to consider whether a person seeking to exclude under *Weeks* must claim or prove any relation to the

premises searched or the property seized.[5] The lower federal courts, however, with virtual unanimity, have developed a "standing" requirement;[6] while the many decisions differ in their expression of the requirement, they assert the need for some quantum of interest in the premises searched or the property seized before a person can seek the suppression or exclusion of evidence seized in violation of the Fourth Amendment. Several commentators, on the other hand, have questioned the requirement of standing. It has been found to be "the most devitalizing force" and a serious dilution of the protection which the *Weeks* rule was designed to afford. See Grant, Circumventing the Fourth Amendment, 14 So. Cal. L. Rev. 359, 368-70 (1941); Comments, 64 Harv. L. Rev. 1002, 1003 (1951); 97 U. Pa. L. Rev. 728, 729, 730 (1949); 58 Yale L.J. 144, 153-58 (1948); *cf.* Edwards, Standing to Suppress Unreasonably Seized Evidence, 47 Northwestern U. L. Rev. 471-72 (1952).

The Supreme Court of California (albeit by a divided court) recently considered the question of standing and rejected the lower federal court requirement. The California opinion after examining the question concluded that the standing rule of the federal courts is based on a misunderstanding of *Weeks* and is contrary to the spirit and language of other opinions of this court. *People* v. *Martin*, 45 Cal. 2d 755, 290 P.2d 855 (1955).

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[5] See *Goldstein* v. *United States*, 316 U.S. 114, 121 (1942).

[6] In a rare holding, *United States* v. *Janitz*, 6 F.R.D. 1 (D.N.J. 1946) the District Court held that Rule 41(e) of the Federal Rules of Criminal Procedure changed prior practice and barred the evidence "in any hearing or trial," regardless of standing. Contra: *Lagow* v. *United States*, 159 F.2d 245 (C.A. 2, 1946), *cert. denied*, 331 U.S. 858 (1947), rehearing denied 332 U.S. 785 (1947). However, in the *Janitz* appeal the Third Circuit Court of Appeals, while dismissing the appeal, in dictum preferred the *Lagow* position, 161 F.2d 19, 21, note 3.

The reason for requiring standing would be that the exclusionary rule of the *Weeks* case is "remedial" only, *i.e.*, designed to restore the constitutional rights of the defendant violated by the unlawful search and seizure. If that is the basis of the rule, then, as with some other constitutional rights, the remedy would be available only to one whose constitutional rights have been affected. Under such a view a person could invoke *Weeks* only if he could show that he himself was a victim of a violation of the Constitution, that his rights were the rights which were violated and should be vindicated through the exclusion of the evidence.

People v. *Martin*, *supra*, on the other hand, and the commentators cited above urge that the exclusionary rule has purposes beyond the remedial; they argue that the rule is to deter the police from violating constitutional rights by depriving officials of any advantages obtained from such violation; that as a matter of "noblesse oblige" the Government should not take or enjoy any advantage from its own unlawful acts nor should the federal courts be tainted by the results of such acts.

Statements in Supreme Court opinions, in varying contexts, and of various generality support these arguments against the standing requirement. For example, "To sanction such proceedings would be to affirm by judicial decision a manifest neglect if not an open defiance of the prohibitions of the Constitution intended for the protection of the people against such unauthorized action." *Weeks* v. *United States*, 232 U.S. 383, 394 (1914). "The Government cannot violate the Fourth Amendment . . . and use the fruits of such unlawful conduct to secure a conviction . . . All these methods are outlawed and convictions obtained by means of them are invalidated because they encourage the kind of society that is obnoxious to free

men." *Walder* v. *United States*, 347 U.S. 62, 64-65 (1954). The statements of individual justices are also persuasive "It [use of evidence] is denied in order to maintain respect for law; in order to promote confidence in the administration of justice; in order to preserve the judicial process from contamination. . . . The Court protects itself." Brandeis, *J.*, dissenting in *Olmstead* v. *United States*, 277 U.S. 438, 484-85 (1928).

This court has shown again and again that it can and will scrutinize the conduct of federal courts and federal officials to assure the integrity of the judicial process in the federal courts and of the administration of federal criminal justice. "A conviction resting on evidence secured through such a flagrant disregard of the procedure which Congress has commanded cannot be allowed to stand without making the courts themselves accomplices in willful disobedience of law . . . We hold only that a decent regard for the duty of courts as agencies of justice and custodians of liberty forbids that men should be convicted upon evidence secured under the circumstances revealed here." *McNabb* v. *United States*, 318 U.S. 332, 344, 345, 347 (1943); see also *Upshaw* v. *United States*, 335 U.S. 410 (1948); *United States* v. *Rea*, 350 U.S. 214 (1956); *Communist Party* v. *Subversive Activities Control Board*, 351 U.S. 115, 124 (1956).

If the purposes disclosed in such statements rather than the remedial alone, are inherent in *Weeks*, then the questioned evidence should be excluded on the motion of any defendant regardless of any interest in the premises or property. At least as to a dwelling, the police should be discouraged from violating the privacy of the home of one in order to get evidence against another, or, generally, in the hope that evidence might be obtained which, if it cannot be used against the owner, may yet be used against

others. (Distinguishable is the very different case where the person whose rights are directly involved has consented to the search.) The deterrence against violating constitutional rights will be stronger if the police are barred from using the evidence against anyone, rather than only against the direct victim of the search. No matter whose constitutional rights are violated the wrongdoing of the police, the contamination of the courts are just as great whenever evidence obtained by unlawful search and seizure is admitted.

II.

Defendant in Fact Had Standing to Move to Suppress and to Object to Admission of the Questionable Evidence

Even if it be assumed that a defendant must have standing to move to suppress or to exclude evidence, Petitioner should have been held to have such standing in this case.

Petitioner's "standing" can be established at the time of the pre-trial motion by virtue of his relation to the premises searched, or the items seized, both because of his actual relation to the apartment and because of the Government's position. Defendant's "standing" in this aspect of the case can only be defeated if this Court engrafts on the already dubious "standing" rule the further requirement of some lower federal courts that there must be not only objective circumstances to create standing but defendant must also affirmatively make a possibly incriminating claim of interest in the premises searched or the items obtained.

Even more strongly, the Government's own proof at the trial established Petitioner's standing in relation to the apartment and to the items obtained in the search.

A. Defendant had standing at time of pre-trial motion to suppress in the light of his pre-trial testimony.

If the *Weeks* rule is remedial, if only one whose constitutional rights have been invaded has standing to complain and to suppress the results of the violation, it is necessary in a particular case to decide whether the complainant had constitutional rights which were violated. The Federal Rules of Criminal Procedure, in regard to the suppression or exclusion of unlawful evidence, do not speak in terms of constitutional rights. Rule 41(e) provides that a motion to suppress may be made by a "person aggrieved by an unlawful search and seizure." Who is "a person aggrieved" is nowhere defined. It has been assumed that the rules intended no change in pre-existing law and practice in this area, and the lower federal courts, generally, have applied their standing requirement subsequent to the federal rules in the same way as before. On this basis "a person aggrieved" is synonymous with "a person whose constitutional rights were violated."

The Government challenged defendant's standing to make the timely pre-trial motion to suppress.

In support of the motion counsel put defendant on the stand as witness to his relation to the premises. Jones testified that he and the apartment holder were friends; that during the week in question the "owner" of the apartment, Evans, had gone to Philadelphia and had been gone "for about five days"; that Evans gave Jones a key to the apartment and the use of it during his absence; that Jones made some use of the apartment during that time, had a suit and shirt there, had slept "there maybe a night" (R. 24-26).

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[7] See *Lagow* v. *United States*, note 6 *supra*.

The facts as just outlined were brought out on direct and cross examination in connection with the motion to suppress and were never contradicted. That defendant did not claim a greater interest in his motion *pro se* nor in the pre-trial testimony should be of no relevance. The important point is that what defendant did show should have been enough and the motions judge's ruling that defendant was a "guest" and as such lacked standing was mistaken.

The "guest" rule invoked below to defeat the defendant's motion to suppress has been applied in a number of federal courts. But none of them, it appears, has defined "guest"; and none seems to have related any definition of "guest" to the scope and character of the protections of the Fourth Amendment. "Guest" is not a term of art, or of fixed meaning, in the law or elsewhere. A "guest" may be in the home of another for afternoon tea, or for a week-end, for a few minutes or for a few months. A "guest" may be visiting briefly with the owners, or may be occupying the house for an extended period while the owners are away. Doubtless some guests have a better claim to the protection of the Fourth Amendment than others. But some guests, at least, must be entitled to the protection of the Amendment.

The lower federal courts which have denied "guests" standing have done so usually in situations quite different from those in the present case, e.g., *Gibson* v. *United States*, 149 F.2d 381 (D.C. Cir., 1945), *cert. denied sub nom. O'Kelley*, 326 U.S. 724 (1945), and *In re Nassetta*, 125 F.2d 924 (C.A. 2, 1942), where the "guest" was temporarily visiting the premises with the owner there;[8] or *Gaskins*

[8] Since the "guest" was a codefendant in these cases both *Gibson* and *Nassetta* would appear to be overruled by *McDonald* v. *United States*, 335 U.S. 451 (1948), discussed in the text.

v. *United States*, 218 F.2d 47 (D.C. Cir., 1955), where the "guest" was a casual visitor, and was not in charge of the apartment. In at least one case, on the other hand, the Court found standing where the moving party was a "guest" living in the house for the time being. *Alvau v. United States*, 33 F.2d 467 (C.A. 9, 1929). One who "borrows" the apartment of a friend temporarily is as much in "possession" of it and its contents and should have the same rights in regard to it for purposes of standing as one who borrows an automobile: in the latter case standing has been found to be available to the one who borrowed the car even though he disclaimed any interest in the car or its contents. See *United States* v. *Chieppa*, 241 F.2d 635, 638 (C.A. 2, 1957), *cert. denied sub nom. Ivicola* v. *U. S.*, 353 U.S. 973 (1957); *Ellsworth* v. *State*, 295 P.2d 296 (Okl. Cr., 1956). Compare also the temporary control on behalf of another of papers, in *United States* v. *Ong Goon Sing*, 149 F. Supp. 267 (S.D. N.Y., 1957).

The Supreme Court has never held that a "guest" does not enjoy the protection of the Amendment. In *McDonald* v. *United States*, 335 U.S. 451, 456 (1948), the court held that even though it be assumed without deciding that a guest was without rights of privacy violated by an illegal search, the protection of the Fourth Amendment and of the *Weeks* rule extended to a guest, at least where he was codefendant with the owner of the premises.

But logically *McDonald* cannot be distinguished from the present case. In *McDonald* evidence was excluded against the guest Washington when it was excluded against his host and codefendant McDonald. In the present case, the owner of the apartment is in no way involved; only by excluding the evidence against Petitioner can the constitutional protection and the *Weeks* rule be given any effect. Indeed, the present case seems *a fortiori* from *McDonald*.

In *Krėmen* v. *United States*, 353 U.S. 346 (1957), the Court, *per curiam*, ruled that "the introduction against each of petitioners of some items seized in the house in the manner aforesaid, rendered the guilty verdicts illegal." In that case none of the four defendants owned the house in question and only one of them had rented the cabin, under an assumed name. The Court ruled that the evidence should be excluded in the face of arguments by the Government that none of the defendants had sufficient standing to suppress the evidence. See Brief for United States in that case, page 22. The Court in effect overruled the decision of the lower court that there was no standing because the affidavit in support of the motion to suppress did not allege that the affiant (one of the defendants) "owned or otherwise lawfully occupied the premises searched; nor does he identify the items of property seized, if any, which he rather than the other defendant or third parties owned or had in their possession." Record in that case, page 27.

United States v. *Jeffers*, 342 U.S. 48 (1951), is also relevant. In the *Jeffers* case the court upheld the standing of one who had the right to use the hotel room of another to suppress evidence seized there. While it has been said that the Court reached its result primarily on the basis of petitioner's interest in the materials seized, the opinion seems to go beyond. The Court said that the search and the seizure are inextricable and appears to have given weight to the invasion of the constitutional rights of the apartment owner. "To hold that this search and seizure are lawful as to the respondent would permit a quibbling distinction to overturn a principle which was designed to protect a fundamental right." See 342 U.S. at 52. The language of the court suggests that the rights of Evans, the absent apartment holder, strengthens the standing of Petitioner. It has also been suggested that *Jeffers* may

involve an inroad into the requirement of standing. See Comments, 25 So. Cal. L. Rev. 364 (1952); 28 Wash. L. Rev. 56 (1953).

The cases cited show that neither reason nor authority support a rule that everyone who for some purpose may be called a "guest" is automatically denied the right to object to the search of the premises. It may well be that any person lawfully in the dwelling of another is entitled to the protection of his privacy; any blanket rule to the contrary must be rejected. If there is a requirement of standing based on an interest in the premises searched or the property seized, the character and quantum of that interest must be defined particularly in terms of the scope and nature of the constitutional protection and of the *Weeks* rule designed to vindicate that constitutional protection. Some of the lower federal courts which have developed the standing requirement have sought to define the character and quantum of interest necessary, but the definitions have varied in terms and in scope. Some have spoken of some "proprietary or possessory interest in the premises searched or the property seized." *In re Nassetta, supra; Gibson* v. *United States, supra;* also *Coon* v. *United States,* 36 F.2d 164, 165 (C.A. 10, 1929) ("owner, lessee or lawful occupant"). Others suggest broader possibilities, e.g., *Steeber* v. *United States,* 198 F.2d 615, 617 (C.A. 10, 1952) (speaks also of "dominion and control"); *Safarik* v. *United States,* 62 F. 2d 892, 895 (C.A. 8, 1933) ("they neither owned, leased, controlled, occupied, possessed, nor had any interest . . . "); *McMillan* v. *United States,* 26 F.2d 58, 60 (C.A. 8, 1928) ("dominion"); *United States* v. *De Bousi,* 32 F.2d 902 (D. Mass., 1929) ("lessee or licensee"); some would apparently include in the protection of the Amendment anyone lawfully present on the premises searched, i.e., anyone but a trespasser. See *Klee* v. *United States,* 53 F.2d 58, 59, 61 (C.A. 9, 1931); cf. *Stakich* v. *United States,* 24 F.2d 701, 702 (C.A. 9, 1928).

Perhaps it is inevitable that some courts deal with this problem in terms of categories accepted in other branches of the law. The Supreme Court itself, not having decided whether any standing was necessary, has of course not dealt with what is necessary to satisfy the requirement. At any rate this Court has never suggested that the protections of the Fourth Amendment are to be defined in terms of the niceties of property law, of doctrines of "title" or "possession." The Court, on the other hand, has spoken of the Amendment in other terms—as assuring "the security of one's privacy," *Wolf* v. *Colorado*, 338 U.S. 25, 27 (1949), as marking "the right of privacy as one of the unique values of our civilization," *McDonald* v. *United States*, 335 U.S. 451, 453 (1948), and "the right to be let alone" (Brandeis, *J.*, dissenting, *Olmstead* v. *United States*, 277 U.S. 438, 471, 478 (1928).[9] And the Court of Appeals of the District of Columbia in one case suggested a standard which, while it may appear to beg questions and leave them unanswered, yet recognizes the need to relate the question of standing to the protections of the Fourth Amendment. The Court held that "a person who has enough interest in a place to make a search unreasonable has enough interest to object to the search." *United States* v. *Blok*, 188 F.2d 1019, 1021 (D.C. Cir., 1951).

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[9] "Improving Federal Law Enforcement and Administration of Justice," a recent report of the Committee on the Judiciary, United States Senate, containing a summary of the findings and recommendations of the Subcommittee on Improvements in the Federal Criminal Code, had no changes to recommend in regard to search and seizure. The report said: "In this connection, we must say that the rules restricting the police do not exist simply to protect us against the inconvenience of police intrusion. The rules have a symbolic value of the highest importance. They affirm the dignity of the individual. Freedom from the sudden, unjustified 'knock on the door' is a most precious liberty." S. Rep. No. 1478, 85th Cong. 2d Sess., pp. 13-14.

Whether one deals in concepts of property, or in terms of the rights which the Constitution was designed to protect, defendant Jones should have been held to have standing to suppress the evidence in question. The evidence before the judge when he ruled on the motion showed that Jones was in "possession" of and had "dominion" over the premises. He was lawfully on the premises and "in control" of them. In the absence of the owner he was the one, as agent for the owner, to protect those premises against any unlawful intrusion. Keeping out trespassers, including police without a lawful warrant, was within his right and what the apartment owner, Evans, had a right to expect of him.

Jones was in fact the victim of the unlawful search. He was the person "aggrieved by the search" within the meaning of Rule 41(e). *Cf.* Fahy, *J.*, concurring in *Wyche* v. *United States*, 193 F.2d 703, 705 (D.C. Cir., 1951), *cert. denied*, 342 U.S. 943 (1952), petition for rehearing denied 343 U.S. 921 (1952). He had "enough interest" in the apartment "to make the search unreasonable," *United States* v. *Blok, supra.* He had the "right to object to the presence of officers" in the apartment, the standard evidently contemplated even by the dissenting Justices in *McDonald* v. *United States*, 335 U.S. 451, 461, 462. It was his privacy and his right to be let alone which were violated by the unlawful search. One's privacy and one's right to be let alone ought not be lost because one seeks them in the apartment of a friend who is out of town.

B. *Defendant had standing to make the pre-trial motion to suppress, considering Government's position up to that time.*

Jones, we have tried to establish, had standing on the basis of his relation to the apartment searched, as shown by his uncontradicted testimony in support of the motion

to suppress. Defendant's testimony regarding occupancy, control, and possession of the apartment may also constitute an assertion of *prima facie* "possession" of the materials seized in the apartment—an additional basis for "standing." In fact, however, the prosecution itself had already asserted even more definitely an interest by Jones which ought to be sufficient to support his standing, regardless of Jones's affirmative claims. For the Government has from the beginning insisted that Jones occupied the apartment and owned or possessed the narcotics found there. Jones was charged, indicted, tried, and later convicted on two counts of unlawful traffic in drugs in violation of the Harrison Narcotic Act. As to both counts the statutes provide that possession alone shall constitute evidence of violation. In prosecutions for such violations of the Harrison Narcotic Act, the Government generally needs only to charge and prove possession. This was the Government's case against Jones.

At the very beginning it is Jones who is named in the search warrant—expressly as occupying the apartment and possessing narcotics there (R. 1). But there is much more than the warrant to show the Government's position, at pre-trial, on Jones's relation to the premises and the items seized. In the affidavit in support of the search warrant (R. 3); in the police complaint and final commitment (R. 5-6); the prosecution's position was that Jones occupied the apartment and was in possession of the narcotics obtained by the challenged search. Not only is possession the crux of the crime but possession is obviously charged to Jones by the indictment (R. 7-8). The Government does not claim that the "possession" which the defendant must show to support standing is of a kind different from the "possession" which the Government charged and had to prove to convict him. But the Government asserts, in effect, that it can charge, and prove, and

convict a defendant of possession of narcotics, and at the same time object to his right, which such possession should give him, to challenge unlawful seizure of these narcotics. The Government insists that to sustain his standing the defendant must affirmatively claim possession of the materials or of the premises. And in this very case the prosecution made it quite clear that if the defendant claimed possession, his claim might be used against him as an admission of the essential ingredient of the crime with which he is charged (R. 22, 27, 31-32).

It is not entirely clear that a claim of possession in a motion to suppress should be admissible as evidence at the trial. But some courts at least have so held or intimated, at least as to testimony in support of the motion, at least where the motion to suppress is not upheld. Compare *Heller* v. *United States*, 57 F.2d 627, 629 (C.A. 7, 1932), *cert. denied*, 286 U.S. 567 (1932), and *State* v. *Dersiy*, 121 Wash. 455, 209 Pac. 837 (1922), with *Safarik* v. *United States*, 62 F.2d 892 (C.A. 8, 1933); and Edgerton, *J.*, dissenting in *Wilkins* v. *United States*, 258 F.2d 416 (D.C. Cir., 1958), *cert. denied*, 357 U.S. 942; *Fowler* v. *United States*, 239 F.2d 93 (C.A. 10, 1956), sees the rule as being that if the motion is granted it is not admissible, if it is denied it is admissible, but the *Heller* case, for instance, made no such distinction. And the prosecution is likely to succeed—as it did in this case—in frightening defendants and defendants' counsel into not claiming possession (see R. 22, 27). If an affirmative claim of possession in these cases were essential to prove standing, it is obvious that many defendants, the victims of unlawful search and seizure, could not or would not move effectively to suppress the illegal evidence. As a result, the *Weeks* rule would become meaningless in these cases, its remedial and deterrent effects would evaporate, and the Government could violate the Fourth Amendment and convict persons

with evidence unlawfully seized. All the purposes of the *Weeks* rule, whether they be only remedial, or also deterrent to the police and a safeguard to the integrity of the administration of justice, would be frustrated.

To hold that the defendant must affirmatively claim possession to prove his standing, where the crime with which he is charged has such possession as its essential ingredient, is to compel him in effect to choose between his rights under the Fifth Amendment not to incriminate himself and his rights under the Fourth Amendment to be secure from unlawful search. Indeed, it may be a dilemma in which choosing either horn defeats him. For, as the prosecution would have it, the defendant may lose either way: if he does not claim possession, the evidence cannot be suppressed and he can be convicted by the evidence unlawfully obtained; if he claims possession (perhaps even if he succeeds in suppressing the evidence), his claim of possession or the affidavits in support of it may be introduced as the evidence of possession and he might be convicted on that alone. This dilemma would have it that in these cases the Fourth and Fifth Amendments nullify each other!

A number of lower federal courts have imposed this dilemma on the defendant in such cases. *Connolly* v. *Medalie*, 58 F.2d 629 (C.A. 2, 1932), is the leading case. These cases generally do not discuss or even take note that an infringement of constitutional protection results and that to impose this dilemma on the defendant may itself constitute an infringement of defendant's constitutional rights. See Edwards, Standing to Suppress Unreasonably Seized Evidence, 47 Northwestern L. Rev. 471, 487 (1952); Comment, 97 U. Pa. L. Rev. 728, 729 (1949). One court, at least, has rejected the attempt to impose this dilemma on the defendant. In *United States* v. *Dean*,

50 F.2d 905 (D. Mass., 1931), the defendant not only failed to claim possession but affirmatively disclaimed it. The Court said:

> ". . . The Government contends that he is not, therefore, in a position to question the legality of the search. The indictment, however, involves an assertion that the property was in the possession or control of Dean. The government cannot maintain that he was the owner of the property for the purpose of convicting him and was not the owner for the purpose of searching it. Even if Dean put his objection to the search on a false ground, as the government claims, the search was nevertheless against his will and consent. There is nothing to indicate that he so phrased his refusal of permission to search as to waive other legal grounds of objection than that which he stated." 50 F.2d at 906.

And compare *Agnello v. United States*, 269 U.S. 20, 34 (1925).[10]

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[10] See also Fahy, *J.*, concurring in *Brandon* v. *United States*, D.C. Cir., July 9, 1959; Bazelon, *J.*, dissenting, *Christensen* v. *United States*, 259 F.2d 192, 194-201 (D.C. Cir., 1958), where the majority did not reach the issue. Compare *Wood* v. *State*, 156 Tex. Cr. 419, 243 S.W.2d 31 (1951); *People* v. *Grod*, 385 Ill. 584, 53 N.E. 2d 591 (1944) (bars "dilemma" as to dwellings).

Safarik v. *United States*, 62 F.2d 892 (C.A. 8, 1933) cited in the text at page 33, solved the problem in another way by insisting that the motion to suppress cannot be used against defendant. The reasoning of that court, highly pertinent on the problem of dilemma, would apply also to testimony in support of this motion; most of it would apply equally whether the motion to suppress were granted or denied. But unless the rule of that case were recognized and universally accepted, until courts and prosecutors cease to claim the contrary, and counsel for defendants know and can confidently rely on it, defendant's rights are not protected. In any event, even if the motion or the affidavits were not admissible, there is no reason not to accept defendant's standing on the basis of the Government's case.

We believe there is nothing in the Federal Rules of Criminal Procedure, or in the *Weeks* rule and in the standing requirement under it, that compels or justifies the imposition of this dilemma on the defendant; we believe that the spirit of the *Weeks* rule, in fact, rejects it. The standing requirement does not carry with it the requirement that the defendant affirmatively claim the necessary interest; this is not a case where there is a question as to whether the constitutional right was waived, whether there was consent to the search, by either Jones or Evans. The question is rather, does the defendant in fact have the necessary interest, however that appears. If there is any "dilemma," it might be said that the Government must suffer it. The Government which chooses to charge a person with possession may be effectively barring itself from denying that he has possession for purposes of the standing requirement. "Possession" in these cases should be treated as a "judicial admission" by the United States, one which the Government has to make to proceed with its case, and one which it should not be able to deny, and one which the defendant should not have to assert or prove for any purpose. While this may appear to be a kind of dilemma for the Government it is not really a choice between alternative rights or even a nullification of both rights as is the "dilemma" if imposed upon the defendant. To compel the Government to accept the defendant's standing when it charges him with the facts which support that standing is a natural and proper consequence. The Government loses nothing thereby. If the narcotics were in fact in defendant's possession, but were taken by unlawful search, then the Government under the *Weeks* rule, is not entitled to convict him on this evidence. If, on the other hand, the defendant did not have possession, it still does the Government no harm to suppress the evidence on his motion; the Government

would only be failing to convict a man who is not in fact guilty of possession.

The point is that the Government ought not to be able to convict with evidence obtained by unlawful search. It should not be allowed to achieve this result by exploiting and manipulating the requirement of standing, and federal procedures related to standing. What the Government seeks to do when it tries to impose this dilemma on the defendant, what the Government tried to do to Jones and did successfully in the lower courts, is to convict him entirely on evidence unlawfully obtained from him. This is precisely what the *Weeks* rule was intended to prevent.

C. *Defendant had standing in the light of the Government's position at the time of the objections to the evidence at the trial.*

If there were question as to the defendant's standing at the pre-trial motion to suppress, Jones's standing ought to have been clear beyond any doubt at the time counsel repeated his objection to the reception of the evidence at the close of the Government's case.

Rule 41(e) expressly provides that "the Court in its discretion may entertain the motion [to suppress] at the trial or hearing." There is nothing in the rule which suggests that there is no discretion to entertain such motion again at the trial in the light of the evidence presented although it had been made and rejected pre-trial. Nor is the rejection of the motion to suppress a bar to the right of the defendant to object to the admission of evidence at the trial as being contrary to the *Weeks* rule. The Supreme Court, as we shall see, approved this practice in cases which arose before the Federal Rules of Criminal Procedure and no one has ever suggested that the rules

were intended to modify such practice. Lower federal courts, including the Court of Appeals for the District of Columbia, have upheld the right of the defendant to object at the trial regardless of any earlier motion to suppress.

At the trial the Government introduced evidence that Jones occupied and possessed the premises, and that he had proprietary and possessory interest in the materials. The Government's leading witness testified that Jones told him that he was "living" in the apartment (R. 50, cf. 37, 52), and that the capsule and some of the equipment were his (R. 38). Either of these admissions alone, the Government should concede, would be enough to establish the defendant's standing. At the time that counsel made his final objection to evidence at the close of the Government trial testimony, there was no evidence contradicting the Government's case on these points.[11] The District Court continued to disregard the objection. What the District Court should have done at this point is clear from the cases of this Court. In *Gouled* v. *United States*, 255 U.S. 298 (1921), the Court answered certified questions. The last of these was:

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[11] If out of ignorance or fear, enhanced by the prosecution's warning that claim of interest would be used against him, Jones had earlier sought to minimize his interest in the premises at pre-trial, he had yet asserted facts sufficient to establish standing as occupant and possessor of the apartment searched. If he did not claim ownership of the materials seized, neither did he in fact deny it, either at the time of the original motion or at any time prior to the rejection of his counsel's objections to the admission of the evidence in the course of the trial. Even in his early motion to dismiss the indictment, made *pro se* before counsel was assigned, Jones was in effect entering a demurrer. He contended that the place of arrest was not his home but asserted that he had authority to stay there and had stayed there before; he said nothing about the ownership of the materials except that his relation to the premises "*gave no grounds to believe* that property not in his possession and not having marks of personal identification, belonged to petitioner". [emphasis supplied] (R. 9).

"If papers of evidential value only be seized under a search warrant and the party from whose house or office they are taken be indicted;—if he then move before trial for the return of said papers and said motion is denied—is the court at trial bound in law to inquire as to the origin of or method of procuring said papers when they are offered in evidence against the party so indicted?"

To this the Court replied:

"The papers being of 'evidential value only' and having been unlawfully seized, this question really is, whether, it having been decided on a motion before trial that they should not be returned to the defendant, the trial court, when objection was made to their use on the trial, was bound to again inquire as to the unconstitutional origin of the possession of them. It is plain that the trial court acted upon the rule, widely adopted, that courts in criminal trials will not pause to determine how the possession of evidence tendered has been obtained. While this is a rule of great practical importance, yet, after all, it is only a rule of procedure, and therefore it is not to be applied as a hard and fast formula to every case, regardless of its special circumstances. We think rather that it is a rule to be used to secure the ends of justice under the circumstances presented by each case, and where, in the progress of a trial, it becomes probable that there has been an unconstitutional seizure of papers, it is the duty of the trial court to entertain an objection to their admission or a motion for their exclusion and to consider and decide the question as then presented, even where a motion to return the papers may have been denied before trial. A rule of practice must not be allowed for any technical reason to prevail over a constitutional right.

> "In the case we are considering the certificate shows that a motion to return the papers, seized under the search warrants, was made before the trial and was denied, and that on the trial of the case before another judge, this ruling was treated as conclusive, although, as we have seen, in the progress of the trial it must have become apparent that the papers had been unconstitutionally seized. The constitutional objection having been renewed, under the circumstances, the court should have inquired as to the origin of the possession of the papers when they were offered in evidence against the defendant."

The *Gouled* case presents a situation strikingly similar to the present case. Here, what appeared in the course of the trial was not directly that there had been an unconstitutional seizure of materials; that question could not appear at the trial because the Court would not consider the validity of the warrant. What did appear at the trial was that defendant on the police testimony had standing to challenge the validity of the warrant and to object to an unlawful search and seizure, and that the earlier motion to suppress was improperly dismissed for lack of standing. Or, since the denial of standing admitted, as if by demurrer, the invalidity of the warrant, one may say that when standing appeared at the trial, both standing and unconstitutionality were present, and there was a situation virtually like *Gouled*. We see no basis for treated this situation differently from that to which the Court addressed itself in the *Gouled* case. Here, too, we believe that it was "the duty of the trial court to entertain an objection to their admission or a motion for their exclusion and to consider and decide the question as then presented, even where a motion to return [the materials] may have been denied before trial." Here,

too, a "rule of practice must not be allowed for any technical reason to prevail over a constitutional right." Here, too, it appears that a motion to suppress the materials "seized under the search warrants, was made before the trial and was denied, and that on the trial of the case before another judge, this ruling was treated as conclusive, although, as we have seen, in the progress of the trial it must have become apparent that . . . [the materials] had been unconstitutionally seized. The constitutional objection having been renewed, under the circumstances, the court should have inquired as to the origin of the possession of . . . [the materials] when they were offered in evidence against the defendant." The lower court should have entertained the objection, examined the validity of the warrants and excluded the evidence.

On the day on which the Court decided *Gouled*, it also decided *Amos* v. *United States*, 255 U.S. 313. There the Court faced a similar situation. In that case the defendant petitioned for the return of materials claimed to have been obtained by unlawful search and seizure, after the jury was sworn but before any evidence was offered. The lower court denied the motion and the trial proceeded. During the trial the testimony describing the search showed that it was in fact made in violation of the Fourth Amendment. A further motion by counsel to strike this testimony was denied. In reversing the conviction, this Court, citing *Gouled*, said: ". . . the report of the examination and appropriate cross-examination of the Government's witnesses, called to make out its case, shows clearly the unconstitutional character of the seizure by which the property which it introduced was obtained. The facts essential to the disposition of the motion were not and could not be denied; they were literally thrust upon the attention of the court by the Government itself. The petition should have been granted, but it having been denied

the motion should have been sustained." 255 U.S. 313, 316-17. See also *Agnello* v. *United States*, 269 U.S. 20, 33-35 (1925). Compare *White* v. *Texas*, 310 U.S. 530, 532 (1940).

The fact that the evidence of unconstitutionality, or—in our case—of standing, comes from Government testimony rather than from the defendant does not matter, as *Gouled*, *Amos*, and *Agnello* show. While a number of lower federal court cases have carelessly insisted that a defendant must "claim" an interest in the premises or property, and that Government evidence of defendant's standing is not enough, there is no basis for such a requirement. Generally they were misapplying the rule and reasoning of their leading case, *Connolly* v. *Medalie*, cited above. That case came up on a motion to suppress. If standing is required, said Judge Learned Hand for the circuit court, the motion must allege it and later prove it, to supply that key ingredient. "The petition is a pleading; it must squarely allege some violation of the petitioner's rights; else he has no standing." 58 F.2d 629, 630. That court, we have said, erred in not accepting the Government's charges of possession to supply the necessary standing. But that case did not pretend to hold or to say that clear evidence of possession at the trial, if produced by the Government rather than by the defendant, is inadequate. On this question, had it been before it, the circuit court would have been bound to follow *Gouled* and *Amos*. This, in effect, was what the Court of Appeals for the District of Columbia did in *Williams* v. *United States*, 237 F.2d 789 (1956), a case where the defendant—unlike Jones—had affirmatively disclaimed ownership of the drugs. The Court said: "In a pre-trial motion to suppress appellant had disclaimed ownership of the capsules. But when his objection to their admission was renewed and acted upon at the trial itself the unchal-

lenged testimony of the prosecution showed that the capsules were in appellant's possession until he dropped them, thus giving him standing to object." See *Steeber* v. *United States*, 198 F.2d 615, 617 (C.A. 10, 1952); *Alvau* v. *United States*, 33 F.2d 467, 470 (C.A. 9, 1929); see also Fahy, *J.*, concurring in *Wyche* v. *United States*, 193 F.2d 703, 705 (D.C. Cir., 1951), *cert. denied*, 342 U.S. 943 (1952), petition for rehearing denied, 343 U.S. 921 (1952), and in *Brandon* v. *United States* (D.C. Cir., July 9, 1959); Bazelon, *J.*, dissenting in *Christensen* v. *United States*, 259 F.2d 192, 194-201 (D.C. Cir., 1958), where the majority did not reach this issue.

That the lower court erred in denying the standing of the defendant is, we believe, clear on three separate grounds, each of them alone adequate. (1) The defendant had standing to make the motion to suppress because it appeared from Jones's testimony in support of the motion that he was the lawful occupant of and in control of the premises; (2) he had standing to make the motion to suppress because the crux of the Government's case against him was possession of the narcotics and the warrant and other pre-trial papers of the Government asserted that Petitioner occupied the apartment and possessed the seized items; (3) the objection to the evidence at the close of the Government's case should have been entertained because evidence—at that time uncontradicted—showed any necessary interest by the defendant in both premises and materials.

It should be stressed that nothing claimed or urged by the defendant on this issue would impose new limitations on the powers of the police or raise new obstacles to the effective enforcement of criminal law. What the police did in this case, by hypothesis, was a violation of the Constitution. If the warrant was invalid they had no

right to conduct the search and could not claim any such right. The police then should not have conducted the search and one must assume that they will in general refrain from conducting unlawful searches. To uphold Jones's standing, then, or even to deny the requirement of standing, will not bar police from doing anything which they are now lawfully doing. The only question is whether the accident that the person who occupied the apartment and who was the target of the police, was not the "owner" of the apartment should enable the police to use the fruits of their unlawful act; whether when the Government charges and testifies to "possession" and testifies to occupancy the defendant can be denied the standing which that possession or occupancy give him. The defendant urges that the evidence should be excluded, on the basis of reason and precedent, and consistent with the proper and liberal interpretation of the Fourth Amendment which the Supreme Court has enjoined. See *Gouled* v. *United States*, 255 U.S. 298, 303-304 (1921); *Johnson* v. *United States*, 333 U.S. 10, 17 (1948).

III.

The Warrant Was Issued Without Probable Cause

The courts below erred in denying the defendant's right to challenge the validity of the warrant. Whether the warrant was properly issued on probable cause should, then, have been considered by the lower court on the defendant's motion to suppress, or later on the objections to the evidence at the trial. Since the lower court failed to consider it, the Court of Appeals should have done so. Now, we urge, that question should be considered by this Court.

The validity of the warrant in this case depends entirely on the sufficiency of the police affidavit before the Com-

missioner which is set forth in the record (R. 3); there are no other questions of fact, no issue of credibility of witnesses, no other issue on which the findings and judgment of the lower court might be needed or desired. That the defendant is actually serving a sentence pursuant to conviction based entirely on the challenged evidence should urgently impel this Court to settle whether the conviction was properly obtained on lawful evidence.

The warrant, we believe, was invalid. The Constitution, this Court has stressed, interposed the impartial, objective, judicious judgment of a judicial officer in order to protect the privacy of the individual from over-eager intrusions of police officials. *Jones* v. *United States*, 357 U.S. 493, 498 (1958); *Giordenello* v. *United States*, 357 U.S. 480, 486 (1958); *McDonald* v. *United States*, 335 U.S. 451, 455 (1948); *Johnson* v. *United States*, 333 U.S. 10, 14, 17 (1948). It is the magistrate or commissioner who must "be satisfied that the grounds for the application exist," Rule 41(c), that there is probable cause for the search of the particular place for particular things.[12]

In this case, a police officer swore in an affidavit that he received a tip from a source which "has given information to the undersigned on previous occasion and which was correct," as well as from "other sources." This is the

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[12] *E.g.*: "We are not dealing with formalities. The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. Power is a heady thing; and history shows that the police acting on their own cannot be trusted. And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home." 335 U.S. at 455-56.

only relevant statement under oath before the Commissioner. The Commissioner is not given the name or any identification of the one source or any clue as to the others. There is nothing to indicate that the tipster knew what "narcotic drugs" met the law's definition so as to be unlawful. Nor is his reliability clearly asserted, as is frequently done in such affidavits.

The affidavit seems instead to be worded with intentional ambiguity. The magistrate is told that the informant had given information "on previous occasion," which states with certainty only *one* previous occasion, hardly enough to establish reliability. And while it is asserted that the information which the informant gave on one occasion was correct, it is not clear that the informant did not give in correct tips on any number of other occasions. No affidavit was presented to the Commissioner from this or any other informant. None of the informants was brought before the Commissioner for an examination.[13] No reason is given for the failure to take any of these obvious steps to give the Commissioner probable cause to issue the warrant. Nor, so far as appears, was there any examination of the police officer on any of these points, not even on the reliability of the informant in the past. Moreover, probable cause must be shown specifically with respect to the place to be searched. Yet nothing, it may be observed, was before the magistrate which would warrant him in finding probable cause that narcotics were being held by this defendant in that apart-

[13] See Mr. Justice Bradley, on circuit, in *In re Rule of Court*, 20 Fed. Cas. No. 12,126 (C.C.N.D. Ga. 1877), in regard to probable cause for issuing arrest warrants. "After examination of the subject we have come to the conclusion that [an affidavit of an officer, upon relation of others whose names are not disclosed] does not meet the requirements of the Constitution . . . In other words the magistrate ought to have before him the oath of the real accuser, presented either in the form of an affidavit or taken down by himself by personal examination."

ment when that apartment was not owned by him and there was no indication to the magistrate that he had any connection with it—except for the tips. *United States* v. *Price*, 149 F. Supp. 707, 709 (D.C.D.C., 1957).

Having gotten a tip, the standard police practice is to investigate it or corroborate it. Nothing was done: no observation, no investigation, no corroboration. The apartment was not placed under surveillance, nor was the defendant, not even a minimum which might have been afforded probable cause to connect the defendant with the apartment in question. No agent of the police attempted to go there to see whether narcotics could be purchased there, and to learn who was "in charge." No investigation was made of the defendant which might uncover some support for suspicions that he was engaged in peddling drugs. Nor is there anything in the case to indicate any urgency which might explain, if not justify, why good police practice was not followed.

The other statements in the affidavit are of no relevance. That the defendant was "familiar" to the members of the Narcotic Squad is meaningless, and appears an unworthy attempt to give sinister meaning to an ambiguous fact. Neither in the affidavit nor in person was any explanation given as to what was meant—or insinuated—by "familiar" or what possible relevance it had to justify a warrant. The Commissioner himself was perhaps "familiar" to the Narcotic Squad. Nor can any support for "probable cause" be obtained from the statement that the defendant had "admitted to the use of narcotic drugs" and displayed "needle marks as evidence of same." That one uses narcotics does not show that one peddles them, any more than during prohibition days that one had drunk illegal liquor and was intoxicated was evidence that he sold it or even unlawfully possessed it at a particular time or place. Cf. *Hyde* v. *Commissioner*, 201 Ky. 673,

258 S.W. 107 (1924). In regard to narcotics there must surely be hundreds of users for every peddler. In this very case, the defendant was the only one of six persons present who was prosecuted for traffic although the police testified that they had been told that all of those present were addicts (R. 46). In any event, this was an affidavit in support of a warrant to search an apartment, not a warrant to arrest Jones. No "familiarity" with the defendant, no knowledge of any "addiction" by him can possibly afford "probable cause" to search an apartment which was not defendant's home and with which the affiant asserted not the slightest basis of his own knowledge to connect the defendant. As to the apartment there was absolutely nothing but the tip.

Probable cause cannot, of course, be defined with precision; its existence can only be determined in the light of the facts and circumstances of the particular case. *Go-Bart Importing Co.* v. *United States*, 282 U.S. 344, 357 (1931). Precedents and analogies, therefore, are difficult to weigh and compare. And yet, we believe, neither this Court, nor any lower federal court, nor, indeed, so far as we can find, any state court, has found probable cause on a basis as flimsy as that presented to the Commissioner in this case. The affidavit, as we have seen, contained no relevant fact whatever as of the affiant's own knowledge; nothing whatever observed, or heard, or smelled by him, no investigation or corroboration. An affidavit should contain information to the truth of which the affiant can swear, his oath, then, being some assurance of the truth of the facts alleged. He can be cross-examined about them by the Commissioner. Of what avail is an affidavit which contains no relevant facts as of the affiant's own knowledge, nothing but hearsay from informants unnamed, their reliability uncertain and even unclaimed, not brought before the Commissioner for his examination.

their statements not even under oath. The magistrate's judgment is in effect "thirdhand"—not any knowledge of his own, not any knowledge of the affiant's, but that of one absent, unknown, not sworn. The standards of probable cause for a search warrant for a dwelling cannot be less rigorous than those for arrest without a warrant on probable cause that an offense was being committed. It is difficult to believe that any court would hold that on the tip alone in this case the police could have gone to this apartment to arrest Jones without a warrant. Cf. *Jones* v. *United States*, 357 U.S. 493 (1958).

The cases in which this Court found probable cause were different. Generally, they did not involve a search of a dwelling, as to which this Court has stressed, again recently, that except if incident to arrest, a dwelling house cannot be searched without a valid warrant no matter how much probable cause exists. *Jones* v. *United States*, 357 U.S. 493, 497-98 (1958); *Agnello* v. *United States*, 269 U.S. 20, 33 (1925).

Draper v. *United States*, 358 U.S. 307 (1959), involved arrest without warrant in a public place. There was a tip by an informer whose information the agent had always found to be accurate and reliable, which was thoroughly "checked out" by the agent, the information corroborated in every detail. The informant in that case was named and was a "special employee" of the Bureau of Narcotics, as stressed by the Court. Even the majority of the Court, upholding the arrest, did not suggest that the tip alone would have supplied "probable cause" for a magistrate to issue an arrest warrant; their point was that by the time the police acted they had probable cause in the precise corroboration of the tip from this informant.

In *Brinegar* v. *United States*, 338 U.S. 160 (1949), where this Court found probable cause for search of an auto-

mobile without a warrant, the arresting officer had himself previously arrested the defendant for the same crime of transporting liquor into the State in violation of its laws; he had seen the defendant loading liquor in the adjacent State on at least two occasions during the preceding six months; he knew the accused had a reputation for hauling liquor; he recognized both the defendant and his car as he went past; the car appeared to be "heavily loaded" and unusually weighted; the defendant increased his speed as he drove by the officers. In addition to these numerous elements, the Court also stressed that this was the search of an automobile, not of a dwelling house. "No problem of searching the home or any other place of privacy was presented" there. 338 U.S. at 176. On the other hand, an automobile is "elusive," may escape, and offers a situation of some urgency.

Husty v. *United States*, 282 U.S. 694 (1931), also involved an automobile. The officers who made the arrest knew the defendant to be a "bootlegger" for a number of years before the arrest, and had arrested him twice before for the same violation. The officer had known the informant for eight years and was in frequent contact with him, and the information given to the officer on previous occasions had always been found to be reliable. The officer corroborated the tip finding one of the cars described at the point indicated. And the Court noted that some of the codefendants present attempted to escape when hailed by the officers as adding to the probable cause for the search.

The other cases where this Court held that there had been probable cause contain similar elements not found in the present case. In *Dumbra* v. *United States*, 268 U.S. 435 (1925), the search was of a place of business, and the affidavit alleged personal investigation and observation. In *Steele* v. *United States*, 267 U.S. 498 (1925), also, the

affidavit alleged personal knowledge of affiant. On the other hand, the Court has held that probable cause did not exist where it was not shown to the Commissioner "from facts or circumstances presented to him under oath or affirmation." *Nathanson* v. *United States*, 290 U.S. 41 (1933).

In the lower federal courts, too, where "probable cause" was found, there were important elements of personal knowledge, investigation and corroboration, in addition to what was obtained from informants, in some instances sworn to be reliable. See, e.g., *Weise* v. *United States*, 251 F.2d 867 (C.A. 9, 1958), *cert. denied*, 357 U.S. 936 (1958); *United States* v. *Walker*, 246 F.2d 519 (C.A. 7, 1957); *Clay* v. *United States*, 246 F.2d 298 (C.A. 5, 1957), *cert. denied*, 355 U.S. 863 (1957); *Brawner* v. *United States*, 215 F.2d 753 (C.A. 6, 1954); *Kwong How* v. *United States*, 71 F.2d 71 (C.A. 9, 1934); *Wisniewski* v. *United States*, 47 F.2d 825 (C.A. 6, 1931). And numerous cases have held that there was no probable cause, in some instances where there was more basis than in the present case. See, e.g., *United States* v. *Clark*, 29 F. Supp. 138 (W.D. Mo., 1939); *United States* v. *Keown*, 19 F. Supp. 639 (W.D. Ky., 1937); *United States* v. *Blich*, 45 F.2d 627 (D.C. Wyo., 1930); *Rose* v. *United States*, 45 F.2d 459 (C.A. 8, 1930). See also *Davis* v. *United States*, 35 F.2d 957 (C.A. 5, 1929); *Baumboy* v. *United States*, 24 F.2d 512 (C.A. 9, 1928); *Kohler* v. *United States*, 9 F.2d 25 (C.A. 9, 1925); *United States* v. *Pollack*, 64 F. Supp. 554 (D.N.J., 1946); *United States* v. *Turner*, 126 F. Supp. 349 (D.C. Md., 1954); *United States* v. *Price*, 149 F. Supp. 707 (D.C.D.C., 1957). See Cegas, *Probable Cause on Searches and Seizures*, 3 St. Louis U.L.J. 36, 45-47, 71-73 (1954).

In the District of Columbia, where the present case arose, cf. *Miller* v. *United States*, 357 U.S. 301, 305-06

(1958), the standards for probable cause appear to be considerably higher than present in this case. See, e.g., *Schencks* v. *United States*, 2 F.2d 185 (1924), where the Court held no probable cause although the affidavit named the informant, because the informant had filed no affidavit nor had he been brought before Commissioner; there was no statement of the facts by anyone *under oath*, said the Court.[14]

Many state courts also have denied "probable cause" where there was merely a tip from an unnamed informant, even one alleged to be "reliable" or "responsible." *DeLancy* v. *Miami*, 43 So.2d 856 (Fla., 1950); *Brewer* v. *Comm.*, 314 Ky. 269, 234 S.W.2d 956 (1950); *Carroll* v. *Comm.*, 297 Ky. 748, 181 S.W.2d 259 (1944); *Cooper* v. *State*, 106 Fla. 254, 143 So. 217 (1932); *James* v. *State*, 43 Okla. Cr. 192, 277 P. 682 (1929); *O'Leary* v. *State*, 196 Wis.

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[14] In *Washington* v. *United States*, 202 F.2d 214, 1953, *cert. denied*, 345 U.S. 956, rehearing denied 345 U.S. 1003, the Court of Appeals for the District of Columbia Circuit in an opinion by Bazelon, *J.*, said, "in so far as *Schencks* v. *United States* might be construed to the contrary [i.e., contrary to the decision in Washington], it has been overruled by Brinegar." But in the *Washington* case itself there was not only a source of information claimed under oath to be "reliable," but the affidavit in support of the warrant also detailed personal investigations over a number of days, and other factors. The District Court for the District of Columbia, in *United States* v. *Reynolds*, 111 F. Supp. 589 (1953), has since referred explicitly to *Washington* and held that the *Schencks* case applied even where the police affidavit in support of a warrant was much stronger than in the present case. The careless and irrelevant footnote reference in *Brandon* v. *United States*, D.C. Cir., July 9, 1959, note 4, to *Schencks* as if it had been overruled by *Washington* completely overlooks *Reynolds* and its reasoning. *Wrightson* v. *United States*, 236 F.2d 672, decided by the Court of Appeals for the District of Columbia in 1956, found "probable cause" in a case where the police had been investigating the crime for 12 days and a reliable informant told the police who the robber was and that the alleged robber "was preparing to leave town." See also *United States* v. *Castle*, 138 F. Supp. 436 (D.C. 1955). And surely there is no basis for suggesting that *Brinegar* lowered the standards of "probable cause" as applied to a dwelling house.

442, 220 N.W. 231 (1928); *State* v. *Arregui*, 44 Idaho 43, 254 P. 788 (1927); *Hammond* v. *Commonwealth*, 218 Ky. 791, 292 S.W. 316 (1927); *Jackson* v. *State*, 153 Tenn. 431, 284 S.W. 356 (1926); *People* v. *Elias*, 316 Ill. 376, 147 N.E. 472 (1925); *People* v. *Fons*, 223 Mich. 603, 194 N.W. 543 (1925).

If the affidavit in the present case had alleged only that affiant was "informed," it would be clearly inadequate. The fact that it is also alleged that one informant had been correct "on previous occasion" is hardly enough to make the cause "probable." Even assuming that the test suggested in *Brinegar* v. *United States* applies also to dwellings, the affidavit here does not present "facts and circumstances" within the officer's own "knowledge and of which . . . [he] had reasonably trustworthy information" [emphasis supplied], 338 U.S. 160, 175, to justify a magistrate "of prudence and caution," *id.* at note page 176, in issuing a warrant for the search of a dwelling-house.

We believe there was here a shockingly flimsy basis for issuing or seeking a warrant. There was no reason of urgency or any other apparent reason for deviating from standard police practice to investigate and corroborate, to find some basis other than this "tip" to link defendant with traffic in narcotics, and to link defendant or narcotics with this particular apartment. If "probable cause" means anything it must mean more than was here shown. It does not even require any "liberal" interpretation of the Fourth Amendment, *Gouled* v. *United States*, *Johnson* v. *United States*, *supra*, to reject this warrant.

The warrant was invalid, the search was unlawful, the seizure was unlawful, the materials taken should have been suppressed or excluded as evidence. Without them there is no evidence against Jones and his acquittal should be directed.

IV.

The Evidence Should Have Been Suppressed or Excluded Because It Was Obtained by Search in Violation of 18 U.S.C. 3109

We believe that Jones had standing to challenge the validity of the warrant and that the warrant was invalid. The evidence seized should have been suppressed or excluded and the defendant acquitted. There is, however, an additional and independent ground for suppressing the evidence: the warrant, even had it been valid, was executed in violation of law.

It may be urged that the Fourth Amendment itself requires that valid search warrants be served in orderly fashion, by police identification and announcement of the purpose of the "knock on the door." But Congress made this requirement explicit in 18 U.S.C. 3109.[15] That section provides in pertinent part:

> "The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant."

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[15] This Act of Congress codified "a tradition embedded in Anglo-American law," *Miller* v. *United States*, 357 U.S. 301, 313 (1958), quoted at p. 59.

The Court has apparently never considered whether "unreasonable execution of a warrant would constitute unreasonable search and seizure under the Fourth Amendment. In other contexts there are statements suggesting that concepts of "justice" and "reasonableness" like those inherent in "due process" might be inherent also in the Fourth Amendment to bar various abuses of the search process. See Holmes, *J.*, in *FTC* v. *American Tobacco Co.*, 264 U.S. 298, 306 (1924), and Rutledge, *J.*, in *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 213 (1946).

In *Miller* v. *United States*, 357 U.S. 301 (1958), the Court nullified an arrest where police had not properly identified themselves and stated their purpose before using force to enter a dwelling house to effect an arrest without a warrant. The Court there said that the validity of the entry to execute the arrest without warrant must be tested by criteria identical with those embodied in 18 U.S.C. 3109 which deals with entry to execute a search warrant. If violation of these standards warranted the Court in quashing the arrest, then violation of these standards requires also the suppression or exclusion of evidence obtained pursuant to a search warrant. Defendant believes that the method of execution of the warrant in this case violated 18 U.S.C. 3109 and that even if the warrant were valid the evidence obtained pursuant thereto should have been barred.

Assigned counsel for the defendant brought this objection to the admission of the evidence to the attention of the Court of Appeals, and the Court of Appeals entertained it. The majority of that Court, however, rejected the objection. They, first, questioned the defendant's standing to make this objection because he was only a "guest." Then, assuming, *arguendo*, that he did have standing, the Court held that the version of the disputed facts regarding the manner of execution which was offered by the police had been accepted by the lower courts and, in effect, that these facts do not disclose any violation of 18 U.S.C. 3109.

The defendant believes that the majority of the Court of Appeals erred in several respects. It erred in questioning the defendant's standing to raise this objection. It erred in finding that the manner of execution of the warrant, even on the police version of the facts, was consistent with 18 U.S.C. 3109. It made an inexplicable and clear error of fact in saying that the facts as to the manner

of entry which were in dispute had been decided in the lower court adversely to the defendant.

In regard to standing, if, as we believe, the defendant's relation to the premises gave him standing to question the validity of the warrant, it also gave him standing to question the method by which the warrant was executed. Jones was mentioned in the search warrant as the occupant of the apartment and the warrant was directed against him. He was in fact in control of the apartment in Evans' absence. Having been authorized to occupy the apartment, it was his right and his responsibility, to resist unlawful intrusion into that apartment. A statute requiring police identification and statement of their purpose and warrant, it would seem obvious, is directed to whoever is in the apartment, certainly to one who is in charge of it. The police treated Jones as in control of the apartment, not only when they obtained the warrant naming him as the occupant, but throughout the events surrounding the execution of the warrant and the search pursuant thereto, as well as in singling him out subsequently for prosecution and conviction for possession of the narcotics. On their own testimony the police acted toward Jones on the basis that 18 U.S.C. 3109 was applicable in the circumstances.

Under Rule 41(e), "the person aggrieved" by an unlawful search and seizure may object to the evidence on the ground that, among others, "the warrant was illegally executed." If 18 U.S.C. 3109 be treated as just another form of illegal execution of the warrant, standing to object on this basis would presumably be the same as for other objections to the validity of search and seizure under this Rule. The defendant, we have argued above, was a person "aggrieved," with standing to object to the evidence on the ground that the warrant was invalid; he should have the same standing to object on the ground that the warrant was illegally executed.

In fact, however, there may be even less basis for questioning Jones's right to invoke 18 U.S.C. 3109 than there was to question his standing to challenge the validity of the warrant. For if, as the defendant claims, the police violated the requirements of the federal statute for the proper execution of the warrant, there may be no issue of standing at all. Even more effectively than can be argued in regard to standing under the Fourth Amendment, the exclusion of evidence for violation of Section 3109 has an obviously deterrent purpose. The police are to be deterred from violating this statute and denied any fruits of the violation, cf. *McNabb* v. *United States*, 318 U.S. 332 (1943), regardless of whose the premises are or who might be the immediate victim of their violation. In an earlier case the Court of Appeals for the District of Columbia itself ruled that evidence obtained in violation of 18 U.S.C. 3109 had to be quashed although there was no showing of any "standing" in relation to the premises. *Woods* v. *United States*, 240 F.2d 37 (1956), *cert. denied*, 353 U.S. 941 (1957), *cert. denied sub nom. Curtis et al.* v. *United States*, 354 U.S. 926 (1957).

At all events, Jones's standing, if any is necessary, is clear. And we believe that even on the police version of the disputed facts they did not comply with the Act of Congress. The police admit that they knocked on the door, but when asked who was there they failed to identify themselves or to state their purpose. Instead, they sought to mislead the occupant of the apartment into opening the door before he knew who was there. On their testimony, they remained silent and continued to knock. (Jones insists they gave a fictitious name and told him to open.) Later they called the janitor who identified himself, said nothing about the police, until defendant opened the door slightly. In this, we believe, the police failed to comply with the requirements of the statute. Section 3109 was

designed to afford an orderly procedure for the execution of search warrants. The police are not to enter a dwelling unannounced. The occupant is afforded an opportunity to submit to the lawful processes exemplified in a valid search warrant, itself an exception to the privacy of the home. The warrant does not justify, and the statute denies, the right to the police to impose upon occupants of dwellings the need to answer anonymous knockers or to undergo the uncertainty and fear in deciding whether to answer or not. That the privacy of the home was not to be violated by trick has been long settled as regards cases where the police gain "consent" to their entry or search by fraud or trick. Cf. *Gouled* v. *United States*, 255 U.S. 298, 305 (1921); *United States* v. *Reckis*, 119 F. Supp. 687 (D. Mass., 1954); *United States* v. *Bush*, 172 F. Supp. 818 (E.D. Tenn., 1959).

"The rule," this Court said in the *Miller* case, "seems to require notice in the form of an express announcement by the officers of their purpose for demanding admission." 357 U.S. at 309. Even on the police version of the facts, this "express announcement" was not forthcoming for a substantial time, until after, by a ruse, the occupant had been frightened or misled into opening the door. "Congress, codifying a tradition embedded in Anglo-American law, has declared in Section 3109 the reverence of the law for the individual's right of privacy in his house." "Compliance is also a safeguard for the police themselves who might be mistaken for prowlers and be shot down by a fearful householder." *Miller* v. *United States*, 357 U.S. at 313 and note 12 (1958). It is not beyond belief that a person frightened by unidentified banging on his door may resort to force to protect himself.

To insist that the police must comply with what the statute requires imposes no great hardship. Whatever

slight advantage police may seek in achieving the opening of a door before they identify themselves cannot be of significance in the face of the spirit and purpose of the statute and of the Fourth Amendment to assure the privacy of a dwelling. On the version of the evidence most favorable to the police, they did not comply with the spirit of this statute, and of this "tradition embedded in Anglo-American law" epitomized by the Fourth Amendment. The evidence should have been excluded on this ground.

Finally, there is a clear ground of error in the court below necessitating reversal. In one respect, at the very least, a mistake of fact by the majority of the Court of Appeals involves a miscarriage of justice. Even if most of the questions discussed hitherto were decided against Jones—*i.e.*, even if it were held that the warrant was valid, that the police ruse and the subsequent use of force were not in violation of the Fourth Amendment or of Section 3109—there remains an unresolved conflict of testimony as to whether the police in fact identified themselves and declared their purpose after the door was opened part way by the defendant before the police broke it. The police claimed they did (R. 37); Jones insisted that they did not (R. 65).

The Court of Appeals was mistaken, as the dissenting judge pointed out, when the majority said that this question had been decided in favor of the police by the trier of fact in the District Court. This question was not directly or indirectly decided either by the judge or jury. Nor is it even a question on which the weight of credibility is patently in favor of the police. If, as the court below said, "it is not unusual for persons accused to dispute police versions of what occurred" (R. 85), neither is it unusual for police to stretch a point in their own favor when they are called upon to prove that they complied with statutory requirements governing their behavior. As

shown by their own testimony, the police were eager to avoid identifying themselves and stating their purposes; it would be reasonable for triers of fact to find that the police in the same eagerness to make their search, neglected to show their identification and the warrant to indicate their purposes before using force, as Jones contends. Earlier police failure to comply with customary standards to investigate and corroborate the tip before they sought a warrant suggests irresponsible eagerness and bad police practice in the whole case which may well help persuade a trier of fact that police did not state their purpose and show their warrant through a crack in the door before breaking the chain lock.

CONCLUSION

The Supreme Court should reverse the judgment below and direct the acquittal of the defendant on the ground that the only evidence against him was obtained by an unlawful search and seizure pursuant to a warrant unsupported by "probable cause," or, because the search was carried out in violation of federal law. The defendant had standing to object to the validity of the warrant as well as to the manner in which the search was carried out. As a minimum, the Supreme Court should reverse and remand the case to the lower courts for a resolution of facts which, contrary to the assertion of the majority of the Court of Appeals, were not previously determined.

i.e., whether the police in fact, as they urge and as defendant denies, complied with the requirements of 18 U.S.C. 3109 before they broke into the apartment which Petitioner occupied.

Respectfully submitted,

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September, 1959.

BRIEF FOR THE
UNITED STATES

INDEX

CITATIONS

Cases—Continued

Cases—Continued

Cases—Continued

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 69

CECIL JONES, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The majority and dissenting opinions in the court of appeals (R. 82–89) are reported at 262 F. 2d 234.

JURISDICTION

The judgment of the court of appeals was entered on December 19, 1958 (R. 89–90). A petition for rehearing (R. 90–93) was denied on January 20, 1959 (R. 95). The petition for a writ of certiorari was filed on February 18, 1959, and was granted on May 18, 1959 (R. 96; 359 U.S. 988). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether one who seeks to suppress the use as evidence of property taken pursuant to an alleged

illegal search and seizure must show that he is a person "aggrieved" by the search and seizure, *i.e.*, one whose Fourth Amendment rights were violated.

2. Whether, if so, a guest in the premises searched, who claims no interest in the property seized, has the requisite standing.

3. Whether the search and seizure here involved, conducted pursuant to a search warrant, were lawful. This entails the following subsidiary questions:

(*a*) Whether probable cause existed for issuance of the warrant.

(*b*) Whether the police officers executing the warrant gave adequate notice of their authority and purpose, as required by 18 U.S.C. 3109, before using force to enter the premises.

CONSTITUTIONAL PROVISION, STATUTE, AND RULE INVOLVED

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

18 U.S.C. 3109 provides:

> The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

Rule 41(e) of the Federal Rules of Criminal Procedure provides:

> (e) *Motion for Return of Property and to Suppress Evidence.*
>
> A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

STATEMENT

Count 1 of a two-count indictment (R. 7–8), filed October 31, 1957, in the United States District Court for the District of Columbia, charged petitioner with having, on or about August 21, 1957, purchased, sold,

dispensed and distributed, not in or from the original stamped package, a quantity of a narcotic drug, heroin, in violation of 26 U.S.C. 4704(a). Count 2 charged him with having facilitated concealment and sale of the drug, knowing that it had been illegally imported into the United States, in violation of 21 U.S.C. 174. Following a trial by jury (R. 34–74), petitioner was found guilty on both counts, and was sentenced to imprisonment for from two years and four months to seven years on count 1, and seven years on count 2, the sentences to run concurrently (R. 75). The Court of Appeals for the District of Columbia Circuit (one judge dissenting) affirmed (R. 82–90).

1. The principal prosecution evidence at petitioner's trial consisted of certain material evidence—a capsule containing heroin, together with such paraphernalia for administering the drug as hypodermic syringes and needles, a "bottle top cooker", and a silk stocking tourniquet (R. 2, 39–41, 56)—seized pursuant to a search warrant (R. 1–2) in a Washington, D.C., apartment in which petitioner was contemporaneously arrested, and the testimony of two police officers relating to the circumstances surrounding the seizure and arrest (R. 34–51, 51–54). Since petitioner does not challenge the sufficiency of the evidence, but only the denial of a pre-trial motion to suppress the seized materials (R. 13–14) and their subsequent admission at the trial, we discuss the evidence only insofar as it is pertinent to the latter issues.

(*a*) On November 12, 1957, prior to trial, petitioner filed, *pro se*, a motion to dismiss the indictment (R.

9–10) which alleged, *inter alia*, that the property in question—the heroin and the administering paraphernalia—"was seized, not from petitioner and not from any of petitioner's personal property"; and that "[p]etitioner contends that the place of arrest is not his home although he has stayed there before, which gave no grounds to believe that property not in his possession and not having marks of personal identification, belonged to petitioner" (R. 9). The motion also attacked the sufficiency of the affidavit on the basis of which the search warrant was issued (*ibid.*).

On November 26, 1957 (still prior to trial), petitioner, through appointed defense counsel, filed a motion to suppress the seized evidence on the ground that the affidavit "reveal[ed] upon the face thereof" that it was insufficient to support the issuance of the warrant (R. 13–14).[1] The motion alleged no interest on petitioner's part either in the premises searched or the property seized, nor did it challenge the manner in which the warrant was executed.

Both motions were heard by Chief Judge Laws on December 13, 1957 (R. 20–28). When government counsel contended that petitioner lacked standing to make the motion to suppress (R. 21–22) "since he claims neither ownership of the things seized nor an

[1] The warrant and the supporting affidavit both appear in the record (R. 1–2, 3). The question of the validity of the warrant was not reached by the district court because of its decision that petitioner lacked standing to challenge the legality of the search and seizure. We argue, *infra*, pp. 36–39, that the warrant was valid.

526347—59—2

interest in the premises themselves" (R. 22), petitioner's counsel was granted leave to amend the motion "to the effect that at the time of the search and seizure he was rightfully in these premises as an invitee or guest" (R. 22; see also R. 14). Government counsel objected that even this further allegation was insufficient to give petitioner standing because (R. 22)—

> Merely being an invitee in the premises does not give him standing to move to suppress evidence found on the premises themselves. These items were not taken from the person of the defendant. In order for him to have standing to move to suppress, he either has to allege ownership of the items seized or an interest in the premises themselves, that is, as lessee, owner or occupant; guest alone is not sufficient. —

When the court indicated that it wished to hear evidence on the matter (R. 23), counsel for petitioner put petitioner on the stand (R. 24–27). Petitioner testified that the premises where the seizure was made, Apartment 36 at 1436 Meridian Place, N.W., was the apartment of a friend of his named Arthur Evans;[2] that Evans, who had gone to Philadelphia about five days prior to the day of the seizure, had given petitioner a key to and permission to use the apartment; that he (petitioner) paid no rent for and "wasn't living" in the apartment at the time of the seizure, though he had slept there "maybe a night", with Evans' permission; and that his (petitioner's) home

[2] The record shows that petitioner gave his friend's name as "Evans Arthur" (R. 24, 26). Elsewhere in the record he is called "Arthur Evans" (R. 50, 61), and the court of appeals so refers to him (R. 84).

address at the time in question, where he paid rent and lived with his parents, was 811 9th Street, N.E. (R. 24–26).

The court denied the motion to dismiss the indictment (R. 21), but on request of petitioner's counsel continued the motion to suppress until December 20, 1957 (R. 27–28). After further argument on that day (R. 29–32), the court denied the motion for lack of standing to make it (R. 32).

On January 31, 1958, the case came on for trial, at which time petitioner renewed the motion to suppress (R. 33). The trial judge (Holtzoff, D.J.) denied the motion without inquiring into its merits, on the ground that the pre-trial decision of the motion by Chief Judge Laws was "binding on the trial judge" and reviewable only on appeal in the event of conviction (*ibid.*). When, at the conclusion of the government's case, the seized items were introduced in evidence, petitioner again objected to their admission (R. 56).

(*b*) At the trial, Officer Didone, a member of the Narcotic Squad of the District of Columbia Police Department, testified that on August 21, 1957, a search warrant was procured for the search of apartment 36 at 1436 Meridian Place, N.W. (R. 34–35, 42). The warrant, issued on the basis of an affidavit which is described and discussed *infra*, pp. 36–39, authorized the search of "these premises (including window spaces"), and the seizure therefrom of "heroin, syringes, tourniquets, cookers, and * * * [a]ny other paraphernalia used in the preparation and dispensation of heroin and any other narcotic drugs" (R. 1).

Armed with this warrant, Officer Didone and three other officers—Fogle, Ferguson, and Bonaparte—proceeded to the premises at about 5 p.m. (R. 36). After stationing Officer Bonaparte outside of the premises, "[i]n a position where he would be able to look at the window of apartment 36," the other officers went to the third floor of the apartment building, and knocked on the door of apartment 36 (R. 36–37).

There was a "frosted glass plate" in the apartment door and a figure could be seen behind it. This person, who subsequently proved to be petitioner, called "Who's there?" The officers "remained moot [*sic*]" and knocked again. Again the person inside called "Who's there?", and the officers again made no response. At this point "the shadow" of the person inside the apartment "fade[d] away and walk[ed] away from the door," and in a moment Officer Didone heard a voice in the apartment, which he recognized as petitioner's, calling to someone, "Call the janitor, there is someone at my door and he won't go away" (R. 37).

Thereupon, Officer Didone testified, "Officer Fogle went downstairs and left us. Shortly thereafter he returned to where we were in front of apartment 36 and he had a janitor with him." Officer Didone identified himself to the janitor and told him he had a search warrant for the premises. The janitor then knocked on the door and again the voice inside said, "Who's there?" The janitor said, "Janitor." Thereupon the door was opened three or four inches with the night chain in position. Officer Didone then placed his open wallet, containing his police identi-

fication, inside the door, and said he had a search warrant for the premises. Petitioner, who had opened the door and was standing directly behind it, "tore and went straight back to the bathroom," leaving the door as it was. Officer Didone, "seeing [petitioner] was refusing [him] entrance," pulled the night chain loose, opened the door, and entered the apartment (R. 37, 45).

Officer Didone, followed by the other officers, went directly to the bathroom and told petitioner, whom he recognized, that he had a search warrant, which he showed him (R. 37). Three men and two women, each of whom the officer had been told was a drug addict, were in another room of the apartment (R. 37–38, 46). Officer Ferguson reached up into an awning outside the bathroom window (into which Officer Bonaparte had a few moments before, from his position outside the apartment building, seen petitioner place his hand [1]) and discovered a bird's nest (R. 38). In the bird's nest the officers found needles, a syringe, a "bottle top cooker," and a capsule containing 1.2 grains of heroin (R. 38, 39, 55, 56)—the materials, or some of them, which petitioner later moved to suppress. Upon questioning, petitioner admitted to Officer Didone that the capsule and some of

[1] Officer Bonaparte testified that, while he was standing outside the apartment house, a person who he later learned was petitioner came to the window of apartment 36 and "yelled down * * * that someone was knocking on his door and to call the janitor" (R. 52, 53). The officer further testified that "While this person was calling down to me he was putting his hand on the awning which seemed to have a bird's nest in it" (R. 52).

the narcotics paraphernalia were his (R. 38). Petitioner also told the officer that "the apartment had originally belonged to Arthur Evans who was in Philadelphia," but that "he and Earline Richardson were living there" then (R. 49–50).

(*c*) Petitioner, testifying in his own behalf at the trial (R. 57–65), denied ownership of the capsule and the paraphernalia, denied having admitted ownership of any of these materials to the officers, and denied having placed any of the materials in the awning outside the bathroom (R. 59–60). In addition, his account of the circumstances leading up to the officers' entry into the apartment differed from that of Officer Didone. Whereas Officer Didone testified that the officers remained mute to petitioner's question, "Who's there?", petitioner testified that the person or persons who initially knocked on the door said, "[I]t is Jack, Jim, open the door, Cecil" (R. 58, 62, 63). He denied that Officer Didone identified himself as a policeman before entering the apartment (R. 59). And he testified that the reason he did not "remove the little chain" when he opened the door in response to the janitor's knock was that he "didn't have time, the officer snatched the door" (R. 65).

On cross-examination, he repeated the substance of his testimony in the proceedings on the motion to suppress concerning his status with respect to the apartment. He said that, while he had been given a key to the apartment, he had not been "staying" in the apartment on August 20th and 21st; that he had no permission from his friend, the lessee of the apartment, "to stay in the apartment" but only to "use the

apartment"; that the only clothes which he had in the apartment on the day of the search were those which he "had to put on"; that he had not spent the preceding night at the apartment, but had spent it at his own dwelling; that he had gone to the apartment on the day of the search "to get Earline Richardson," who was there at the time; that he had arrived at the apartment at around 4:30 p.m. (about a half-hour before the officers' arrival); that he did not personally know the other people who were already there; and that he and the other persons in the apartment were talking about "going out" when the officers arrived (R. 60–62).

2. The majority of the court of appeals held (R. 83–84) that "[u]nder the Fourth Amendment, in order for an accused to have standing to prevent the admission of evidence which he thinks was obtained by an unlawful search and seizure, his personal rights must have been infringed upon." The court ruled (R. 84–85) that, since petitioner had alleged in his motion to suppress that he was "only a guest or an invitee in the apartment," and had "consistently disclaimed ownership of * * * the property seized," his "personal rights were not violated"; and that he, therefore, "has no standing to contend that the entry and subsequent seizure were unlawful." The majority further held that, assuming *arguendo* that petitioner had standing, it did not "follow that the court should have suppressed the material seized" (R. 85). The court pointed out (*ibid.*) that 18 U.S.C. 3109 permits the police to "break open any * * * door * * *

to execute a search warrant if, after *notice* of his authority and purpose, he is refused admittance"; and it stated (R. 85, 86) that there was "abundant evidence, even though it is disputed by appellant, that the officer showed his official identity card through the crack in the door and told appellant he was there to execute a search warrant. * * * We think the police performed their duties properly and in accordance with law."[4]

Judge Bazelon, dissenting, was of the view that, "accept[ing] the Government's version" of the manner in which the warrant was executed, the execution was illegal under 18 U.S.C. 3109 (*supra*, p. 2); that this made the materials seized inadmissible; and that their admission was "plain error" which should be noticed under Rule 52(b) of the Federal Rules of Criminal Procedure, notwithstanding the failure of the defense to raise the point in the trial court (R. 86–88). Since he concluded that the conviction had to be reversed on this ground, he found it unnecessary to consider the validity of the warrant or petitioner's standing to challenge it (R. 89).

[4] The majority accepted as true, for the purposes of its discussion of this point, the testimony of Officer Didone (see *supra*, pp. 8–9) as to the manner in which he executed the warrant, "even though it is disputed by appellant" (R. 85). The majority stated that the conflict in the testimony had been "resolved by the trier of fact * * * adversely to the accused" (*ibid.*). However, as pointed out by the dissenting judge (R. 87) and petitioner (Pet. Br. 16, 60), this statement is incorrect. The trial court had no occasion to resolve the conflict in testimony, since petitioner did not there challenge the manner of execution of the warrant.

SUMMARY OF ARGUMENT

I

Petitioner lacked standing to challenge the validity of the search and seizure.

A. 1. The federal courts of appeals have unanimously held that only someone whose personal rights under the Fourth Amendment have been violated by a search and seizure may challenge its validity, *i.e.*, persons claiming some proprietary or possessory interest in that which was unlawfully searched or seized. *Goldstein* v. *United States*, 316 U.S. 114, in holding that one not a party to an illegally intercepted telephone conversation lacks standing to object to the admission of evidence obtained as a result of the interception, recognized, and seemingly approved, this settled limitation on the right to challenge a search and seizure. *McDonald* v. *United States*, 335 U.S. 451, and *United States* v. *Jeffers*, 342 U.S. 48, in deciding that seized property had been erroneously admitted because the searches were illegal, recognized the "standing" requirement. Rule 41(e) of the Federal Rules of Criminal Procedure, which limits the right to move for return of and to suppress seized property to "A person aggrieved by an unlawful search and seizure," also imposes the "standing" requirement.

The standing requirement rests upon sound policy considerations. The exclusionary rule—whose purpose it is to implement and protect the right to freedom from unreasonable search and seizure which the Fourth Amendment guarantees—is an exception to

the general principle that relevant evidence will be considered without regard to how it was obtained. It follows from the personal nature of the underlying right that only a person whose rights have been infringed is eligible to enjoy the immunity which the rule confers.

2. To reject the settled principle of standing, as petitioner urges, would constitute an unjustifiable departure from the salutary principles which the courts have developed over the years in holding that only the person in whose favor a privilege runs may assert it. Thus, one whose privacy was not invaded cannot complain of illegal wire tapping, and a person cannot assert another person's privilege against self-incrimination. By the same reasoning, one whose privacy has not been invaded by a search and seizure should not be allowed to challenge its legality.

B. Since petitioner was merely a guest in the apartment searched, and claimed no interest in the property seized, the search and seizure did not violate any of his personal rights under the Fourth Amendment.

1. (*a*) In determining what constitutes a sufficient "proprietary or possessory interest in that which was unlawfully searched or seized" (*Irvine* v. *California*, 347 U.S. 128, 136) to confer standing, the courts have required something more than the tenuous interest here shown. Mere temporary presence in the premises, even though accompanied by some measure of control, is insufficient. A mere guest or "invitee" has repeatedly been held not to have standing to challenge a search.

(*b*) The decisions of this Court relied on by petitioner do not help him. *McDonald* v. *United States*, 335 U.S. 451, expressly left open the question of a guest's standing to suppress. The petitioners in *Kremen* v. *United States*, 353 U.S. 346, unlike the petitioner here, *were living* in the premises. And in *United States* v. *Jeffers*, 342 U.S. 48, the accused, unlike petitioner, claimed ownership of the property seized—the decisive element in that case.

(*c*) A defendant seeking to suppress evidence claimed to have been illegally seized cannot avoid establishing standing on the ground that requiring him to show possession of the seized property would compel him to admit the substance of the criminal charge. *Segurola* v. *United States*, 275 U.S. 106. Since petitioner's motion to suppress did not claim any interest in the seized property or the searched premises, this case does not present the issue whether, if such claim had been made, it could have been introduced against him at the trial.

2. Since petitioner failed to show standing in his pre-trial motion to suppress, the trial court was not required to reconsider the question on the basis of the government's trial evidence. Except where there has been no opportunity to present the matter before trial, a court engaged in trying a criminal case will not take notice of the manner in which evidence was obtained or halt the orderly progress of the trial to try a collateral issue. *Segurola* v. *United States*, *supra*. Where, as here, it is clear that the defendant was in possession before trial of every material fact relative to standing, it lay within the sound discretion

of the trial judge to consider the matter foreclosed by the denial of the pre-trial motion by another judge.

II

The search and seizure were valid.

A. There was probable cause for the issuance of the search warrant. The officer, on the basis of whose affidavit the warrant was issued, did not rely on a mere "tip." The informant's information was a detailed account of illegal trafficking in narcotics, by one who had made purchases of narcotics (including one that very day) at the apartment in question from the named individuals, and who had given the officer correct information on a former occasion. The two persons named by the informant as his suppliers were known to the officer as narcotics users, and the information was corroborated by other sources. Probable cause exists where the facts and circumstances within an officer's knowledge and of which he has reasonably trustworthy information warrant a man of reasonable caution in the belief that an offense has been or is being committed. *Carroll* v. *United States*, 267 U.S. 132; *Brinegar* v. *United States*, 338 U.S. 160; *Draper* v. *United States*, 358 U.S. 307. The officer had probable cause to believe, on the basis of the foregoing information, given by a reliable informant and corroborated by other sources and his own knowledge, that contraband drugs would be found in the premises; and the Commissioner had probable cause so to believe on the basis of the officer's affidavit.

B. The warrant was lawfully executed.

1. Since petitioner did not question the legality of the execution of the warrant in the trial court, this

Court should decide the question (as the court of appeals did) on the basis of the police officer's testimony as to the manner in which he executed the warrant rather than, as petitioner urges, remand the case to the trial court for further hearing. *Giordenello* v. *United States*, 357 U.S. 480, 488.

2. On the basis of the police officer's testimony, the warrant was properly executed. Before the officer used force to enter the apartment, he identified himself to petitioner and told him he had a search warrant. It was only after the officer saw that he was being refused entry, and that petitioner apparently intended to defeat the objective of the search by disposing of the narcotics, that the officer forced the night chain. This procedure satisfied the requirement of 18 U.S.C. 3109 that, prior to breaking open any part of a house in order to execute a search warrant, the police officer give "notice of his authority and purpose." *Miller* v. *United States*, 357 U.S. 301.

The officer's failure to identify himself and announce his purpose to petitioner through the closed (and presumably locked) door when petitioner first answered his knock did not invalidate the execution of the warrant. The officer was justified in assuming that, if he then revealed his identity and purpose, petitioner would dispose of any contraband drugs in the premises (an act which would take but a moment) before admitting him, thereby frustrating the purpose of the search. The reasonableness of the execution of a search warrant must be judged in the light of the nature of the property to be seized; the requirement of notice of authority and purpose before force is used to gain entry should not be interpreted so as to

give the occupant an opportunity to destroy the property before search can commence.

ARGUMENT

I

PETITIONER LACKED STANDING TO CHALLENGE THE VALIDITY OF THE SEARCH AND SEIZURE

A. ONLY SOMEONE WHOSE PERSONAL RIGHTS UNDER THE FOURTH AMENDMENT HAVE BEEN VIOLATED BY A SEARCH AND SEIZURE MAY CHALLENGE ITS VALIDITY

1. In *Weeks* v. *United States*, 232 U.S. 383, this Court held that the Fourth Amendment bars the use in a federal prosecution of evidence secured by federal officials from the accused through an illegal search and seizure. Since that time the lower federal courts have, as petitioner recognizes (Br. 22), held with "virtual unanimity" that, since the rights protected by the Fourth Amendment are personal, the exclusionary rule may be invoked only by persons whose individual rights were violated by the alleged illegal search or seizure.[5] The rule is generally

[5] Every circuit has so held. *E.g.*, *Nunez* v. *United States*, 23 F. 2d 905, 907 (C.A. 1); *Klein* v. *United States*, 14 F. 2d 35, 36 (C.A. 1); *United States* v. *Pepe*, 247 F. 2d 838, 841 (C.A. 2); *United States* v. *Chieppa*, 241 F. 2d 635, 638 (C.A. 2), certiorari denied *sub nom. Ivicola* v. *United States*, 353 U.S. 973; *Whitcombe* v. *United States*, 90 F. 2d 290, 293 (C.A. 3), certiorari denied, 302 U.S. 759; *Mabee* v. *United States*, 60 F. 2d 209, 212 (C.A. 3); *Grainger* v. *United States*, 158 F. 2d 236, 237–239 (C.A. 4); *Kitt* v. *United States*, 132 F. 2d 920, 921–922 (C.A. 4); *Parr* v. *United States*, 255 F. 2d 86, 88–89 (C.A. 5), certiorari denied, 358 U.S. 824; *Lovette* v. *United States*, 230 F. 2d 263, 264 (C.A. 5); *Gowling* v. *United States*, 64 F. 2d 796, 799 (C.A. 6); *Holt* v. *United States*, 42 F. 2d 103, 105 (C.A. 6); *United States* v. *Eversole*, 209 F. 2d 766, 768 (C.A. 7); *United States* v. *Pisano*, 193 F. 2d 361, 365 (C.A. 7);

stated that "he who objects must claim some proprietary or possessory interest in that which was unlawfully searched or seized" (*Irvine* v. *California*, 347 U.S. 128, 136). See, *e.g.*, *Lovette* v. *United States*, 230 F. 2d 263, 264 (C.A. 5); *Sharman* v. *United States*, 219 F. 2d 282, 288 (C.A. 5), certiorari denied, 349 U.S. 921; *United States* v. *Eversole*, 209 F. 2d 766, 768 (C.A. 7); *Washington* v. *United States*, 202 F. 2d 214, 215 (C.A.D.C.), certiorari denied, 345 U.S. 956; *Gorland* v. *United States*, 197 F. 2d 685, 686 (C.A. D.C.); *United States* v. *Pisano*, 193 F. 2d 361, 365 (C.A. 7); *Gibson* v. *United States*, 149 F. 2d 381, 384 (C.A.D.C.), certiorari denied *sub nom. O'Kelley* v. *United States*, 326 U.S. 724; *Kitt* v. *United States*, 132 F. 2d 920, 921–922 (C.A. 4); *In re Nassetta*, 125 F. 2d 924, 925 (C.A. 2); *Gowling* v. *United States*, 64 F. 2d 796, 799 (C.A. 6).[5]

Schnitzer v. *United States*, 77 F. 2d 233, 235 (C.A. 8); *Brown* v. *United States*, 61 F. 2d 363, 364 (C.A. 8); *Kwong Hoe* v. *United States*, 71 F. 2d 71, 75 (C.A. 9); *Nixon* v. *United States*, 36 F. 2d 316, 317 (C.A. 9); *Baskerville* v. *United States*, 227 F. 2d 454, 456 (C.A. 10); *Wilson* v. *United States*, 218 F. 2d 754, 756–757 (C.A. 10); *Accardo* v. *United States*, 247 F. 2d 568, 569–570 (C.A.D.C.), certiorari denied, 355 U.S. 898; *Gibson* v. *United States*, 149 F. 2d 381, 384 (C.A.D.C.), certiorari denied *sub nom. O'Kelley* v. *United States*, 326 U.S. 724. The rule is adverted to in *Irvine* v. *California*, 347 U.S. 128, 136, and in *Goldstein* v. *United States*, 316 U.S. 114, 121 (discussed in the text), the "unanimity" of the decisions on the point is noted.

[5] See also *Pere* v. *United States*, 255 F. 2d 86, 88–89 (C.A. 5), certiorari denied, 358 U.S. 824; *United States* v. *Chiappa*, 241 F. 2d 635, 638 (C.A. 2), certiorari denied *sub nom. Iciola* v. *United States*, 353 U.S. 973; *Scoggins* v. *United States*, 202 F. 2d 211, 212 (C.A.D.C.); *Schnitzer* v. *United States*, 77 F. 2d 233, 235 (C.A. 8); *Mello* v. *United States*, 66 F. 2d 135, 136

In *Goldstein* v. *United States*, 316 U.S. 114, this Court recognized, and seemingly approved, this settled limitation on the right to challenge a search and seizure. In holding that defendants who were not parties to a telephone conversation which had been illegally intercepted, in violation of Section 605 of the Communications Act of 1934 (48 Stat. 1103, 47 U.S.C. 605), could not object to the admission of evidence obtained as a result of the interception, because they lacked standing to do so, this Court stated (p. 121, footnotes omitted):

> * * * While this court has never been called upon to decide the point, the federal courts in numerous cases, and with unanimity, have denied standing to one not the victim of an unconstitutional search and seizure to object to

(C.A. 3); *United States* v. *Comoscente*, 63 F. 2d 811 (C.A. 2), certiorari denied, 290 U.S. 642; *United States* v. *Musacarelle*, 63 F. 2d 806 (C.A. 2), certiorari denied, 290 U.S. 642; *Mabee* v. *United States*, 60 F. 2d 209, 212 (C.A. 3); *United States* v. *Crushiata*, 59 F. 2d 1007 (C.A. 2); *Connolly* v. *Medalie*, 58 F. 2d 629, 630 (C.A. 2); *United States* v. *De Vasto*, 52 F. 2d 26, 29 (C.A. 2), certiorari denied, 284 U.S. 678; *Belcher* v. *United States*, 50 F. 2d 573, 575 (C.A. 8); *Chepo* v. *United States*, 46 F. 2d 70 (C.A. 3); *United States* v. *Messina*, 36 F. 2d 699, 700-701 (C.A. 2); *Nixon* v. *United States*, 36 F. 2d 316, 317 (C.A. 9); *Hogg* v. *United States*, 35 F. 2d 954 (C.A. 5); *Morris* v. *United States*, 26 F. 2d 444, 445 (C.A. 8); *McMillan* v. *United States*, 26 F. 2d 58, 60 (C.A. 8); *Nunes* v. *United States*, 23 F. 2d 905, 907 (C.A. 1); *Armstrong* v. *United States*, 16 F. 2d 62, 65 (C.A. 9), certiorari denied, 273 U.S. 766; *Graham* v. *United States*, 15 F. 2d 740, 742 (C.A. 8); *Klein* v. *United States*, 14 F. 2d 35, 36 (C.A. 1); *Lewis* v. *United States*, 6 F. 2d 222, 223 (C.A. 9); *MacDaniel* v. *United States*, 294 Fed. 769, 771 (C.A. 6), certiorari denied, 264 U.S. 593; *Haywood* v. *United States*, 268 Fed. 795, 803-804 (C.A. 7), certiorari denied, 256 U.S. 689.

> the introduction in evidence of that which was seized.[7] * * * We think no broader sanction should be imposed upon the Government in respect of violations of the Communications Act.

See also *McDonald* v. *United States*, 335 U.S. 451, and *United States* v. *Jeffers*, 342 U.S. 48 (discussed *infra*, pp. 27–28, 28–30), where the Court, in deciding that seized property had been erroneously admitted because the searches were illegal, recognizing the "standing" requirement.[8]

Rule 41(e) of the Federal Rules of Criminal Procedure (*supra*, p. 3) also imposes the "standing" requirement. It limits the right to make a motion for return of and to suppress seized property to "A person aggrieved by an unlawful search and seizure." The Notes of the Advisory Committee on the Rules state that, with one exception not here pertinent, Rule 41(e) "is a restatement of existing law and practice." Since it was well settled when the rules were promulgated that only persons whose personal rights had been violated by a search and seizure had standing to attack

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[7] In a footnote the Court said: "The principle has been applied in at least fifty cases by the Circuit Courts of Appeals in nine circuits, and in the Court of Appeals for the District of Columbia, not to mention many decisions by District Courts. * * *." In the 17 years since *Goldstein* was decided, the number of decisions so holding has greatly increased. Some of the cases are cited *supra*, p. 19, and in fns. 5 and 6, *supra*, pp. 18–20.

[8] Thus, for example, in *Jeffers*, the Court said (at p. 52): "The respondent unquestionably had standing to object to the seizure made without warrant or arrest unless the contraband nature of the narcotics seized precluded his assertion, for purposes of the exclusionary rule, of a property interest therein."

its validity (see *supra*, pp. 18–21), the requirement of Rule 41(e) that the movant be a "person aggrieved" plainly was intended to incorporate the settled "standing" test. The Second Circuit so held in *Lagow* v. *United States*, 159 F. 2d 245, 246, certiorari denied, 331 U.S. 858; see also *United States* v. *Janitz*, 161 F. 2d 19, 21 (C.A. 3).

The "standing" requirement rests upon sound considerations of public policy. The rule providing for exclusion of evidence obtained by an unreasonable search and seizure is an exception to the general principle that relevant evidence will be considered without regard to how it was obtained (*Olmstead* v. *United States*, 277 U.S. 438, 466–469). The exclusionary rule is designed to implement and protect the right to freedom from unreasonable search and seizure which the Fourth Amendment guarantees. *Weeks* v. *United States*, *supra*, 232 U.S. at 393. But that right is a *personal* right, which each individual enjoys in respect of his own person, dwelling-place, papers and effects, and which, like other personal rights and privileges, he may waive. *Zap* v. *United States*, 328 U.S. 624, 628; *Davis* v. *United States*, 328 U.S. 582, 587; cf. *Amos* v. *United States*, 255 U.S. 313, 317. While a major purpose of the exclusionary rule is to deter federal officers from violating the Fourth Amendment (*Rea* v. *United States*, 350 U.S. 214; and see *Walder* v. *United States*, 347 U.S. 62, 64–65), it follows from the personal nature of the underlying right protected that only a person whose rights have been infringed is eligible to invoke the rule, and to enjoy the immunity it confers.

2. Petitioner urges this Court (Br. 21–25), however, to reject the settled principle of standing, and, instead, to promulgate the rule that evidence obtained in the course of an illegal search and seizure "should be excluded on the motion of any defendant regardless" of whether he has any "interest in the premises [searched] or property [seized]" (Br. 24). To do so, we submit, would constitute an unjustified departure from the salutary principles which the courts have developed over the years in holding that only the person in whose favor a privilege runs may assert it.[9] For example, this Court, on the authority of the Fourth Amendment cases, held that only the person whose privacy had been invaded had the right to complain of illegal wire tapping. *Goldstein* v. *United States*, *supra*, 316 U.S. 114. Similarly, since the privilege against compulsory self-incrimination is a personal right (*Rogers* v. *United States*, 340 U.S. 367, 373–374), a party to litigation cannot complain if the court disregards a witness's claim of privilege and directs him to answer. *Morgan* v. *Halberstadt*, 60 Fed. 592, 596–597 (C.A. 2), certiorari denied, 154 U.S. 511. Cf. *Hale* v. *Henkel*, 201 U.S. 43; *Wilson* v. *United States*, 221 U.S. 361. Since one's right under the Fourth Amendment to be free from unreasonable search and seizure is likewise personal (see *supra*),

[9] "Ordinarily, one may not claim standing in this Court to vindicate the constitutional rights of some third party." *Barrows* v. *Jackson*, 346 U.S. 249, 255. As its opinion states (346 U.S. at 255–260), the *Barrows* ruling rests on a "unique situation."

the same considerations require that only the person whose rights have been infringed should be permitted to complain. Third-parties whose rights have not been invaded should be barred from volunteering to challenge the validity of the search and seizure.

In short, we believe that the settled rule of the lower federal courts that only the victim of an unlawful search and seizure has standing to object to the admission in evidence of relevant materials taken in the search—a rule which has been accepted in principle by this Court in the *Goldstein* case, 316 U.S. 114, and is reflected in the explicit language of Rule 41(e) of the Federal Rules of Criminal Procedure—is sound and should be adhered to. This general requirement of standing, we emphasize, is separate and distinct from the question of what kind of interest in the premises searched or property seized is sufficient to confer standing—a question to which we now turn.

B. SINCE PETITIONER WAS MERELY A GUEST IN THE APARTMENT SEARCHED, AND CLAIMED NO INTEREST IN THE PROPERTY SEIZED; THE SEARCH AND SEIZURE DID NOT VIOLATE ANY OF HIS PERSONAL RIGHTS UNDER THE FOURTH AMENDMENT

1. In moving to dismiss and to suppress the seized evidence, petitioner contended that he was only a "guest" or an "invitee" in the apartment (R. 14), and claimed no interest in the seized property (R. 9). We submit that the district court correctly ruled that, on the basis of those allegations, petitioner did not have standing to challenge the validity of the search and seizure.

(*a*) In determining what constitutes a sufficient "proprietary or possessory interest in that which was

unlawfully searched or seized" (*Irvine* v. *California*, 347 U.S. 128, 136; see *supra*, pp. 18–21) to give a defendant standing to question the search and seizure, the courts have consistently required something more than the tenuous interest here shown. Since petitioner claimed no interest in the seized property, the sole ground upon which he could have standing was his physical presence in the apartment. It is well established, however, that such mere temporary presence in the premises, even though accompanied by some measure of control, is insufficient to confer standing.

Thus, it has been held that employees working at the place where property is seized, even though in apparent control of the premises, lack the possessory interest needed to give them standing to attack the validity of the search and seizure.[10] *Connolly* v. *Medalie*, 58 F. 2d 629, 630 (C.A. 2), held that a night watchman, in sole charge of the searched premises, lacked the necessary interest. In the case of a corporation, the officers and managers have been held to lack standing to object to the manner of seizure of the

[10] *E.g.*, *United States* v. *Dellaro*, 99 F. 2d 781, 782 (C.A. 2); *Mello* v. *United States*, 66 F. 2d 135 (C.A. 3); *United States* v. *Conoscente*, 63 F. 2d 841 (C.A. 2), certiorari denied, 290 U.S. 642; *United States* v. *Muscarelle*, 63 F. 2d 806 (C.A. 2), certiorari denied, 290 U.S. 642; *Kelley* v. *United States*, 61 F. 2d 843, 845–846 (C.A. 8); *United States* v. *Crushiata*, 59 F. 2d 1007 (C.A. 2); *Occinto* v. *United States*, 54 F. 2d 351, 352 (C.A. 8); *United States* v. *Messina*, 36 F. 2d 699, 700–701 (C.A. 2); *United States* v. *Mandel*, 17 F. 2d 270, 273–274 (D. Mass.).

corporation's property,[11] even where the person seeking suppression is the sole officer and stockholder.[12]

In the instant case, petitioner admittedly was only a guest in the apartment. He had merely the right to the temporary "use" of the premises, while the tenant was out of town (R. 24). His actual residence, where he lived and paid rent, was elsewhere (R. 25). He did not, in any realistic sense, have dominion of the apartment.

A mere guest or "invitee" has repeatedly been held not to have standing to challenge a search. *Gaskins* v. *United States*, 218 F. 2d 47, 48 (C.A.D.C.); *Gibson* v. *United States*, 149 F. 2d 381, 384 (C.A.D.C.), certiorari denied *sub nom. O'Kelley* v. *United States*, 326 U.S. 724; *In re Nassetta*, 125 F. 2d 924, 925 (C.A. 2).[13] The rationale appears to be that, although the Constitution guarantees the "right of the people to be secure in their * * * houses * * * against unreasonable searches and seizures," a person has no constitutionally protected right to be free from an unreasonable search of someone else's house.[14]

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[11] *E.g.*, *United States* v. *De Vasto*, 52 F. 2d 26, 29 (C.A. 2), certiorari denied, 284 U.S. 678; *Newingham* v. *United States*, 4 F. 2d 490, 493 (C.A. 3), certiorari denied, 268 U.S. 703.

[12] *Lagow* v. *United States*, 159 F. 2d 245, 246 (C.A. 2), certiorari denied, 331 U.S. 858.

[13] In *Alexa* v. *United States*, 33 F. 2d 467, 470 (C.A. 9), which petitioner cites (Br. 28) for the proposition that a "guest" has been held to have standing, the "guest" in fact was domiciled in the searched premises. In the instant case, however, petitioner denied that he "was living" in the premises involved (R. 25; *supra*, pp. 6–7, 10–11). He said he was domiciled elsewhere, and had merely been given "the use" of the subject premises (*ibid.*).

[14] Petitioner, relying upon *Woods* v. *United States*, 240 F. 2d 37 (C.A.D.C.), certiorari denied, 353 U.S. 941, 354 U.S. 926,

(*b*) Petitioner relies (Br. 28–30) upon three decisions of this Court to show that as a guest he had standing to seek suppression of the evidence. The cases are clearly distinguishable.

The first case, *McDonald* v. *United States*, 335 U.S. 451, involved an illegal seizure of lottery paraphernalia from a room in a rooming house in which McDonald, the tenant, and one Washington, his guest, were present. They were jointly indicted, tried and convicted of operating a lottery. McDonald moved for return of the seized property and to suppress its use as evidence; the motion was denied. This Court reversed McDonald's conviction, holding that the trial court erred in denying his motion for return and suppression. It also reversed Washington's conviction.

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contends (Br. 58) that, whatever may have been his standing to challenge the validity of the warrant, he clearly had standing to contest its execution under 18 U.S.C. 3109 (which provides that a police officer may break open any part of a house to execute a search warrant "if, after notice of his authority and purpose," he is refused admittance). See, also, the dissenting opinion of Judge Bazelon (R. 88). The *Woods* case, however, did not discuss the question whether a lesser interest than is necessary to support an attack on the validity of a warrant suffices to give standing to challenge its execution under 18 U.S.C. 3109. We submit that no such distinction can properly be made.

The reason standing is required in Fourth Amendment cases is because the right to be free from unreasonable searches and seizures is personal and, therefore, assertable only by someone whose rights have been violated. See *supra*, pp. 18–24. By the same reasoning, the right under 18 U.S.C. 3109 to have a police officer state his "authority and purpose" before using force to gain entry in executing a search warrant is personal to the one whose dwelling is entered. It, therefore, requires the same showing of standing as the assertion of rights under the Fourth Amendment.

The Court "assume[d], without deciding, that Washington, who was a guest of McDonald, had no right of privacy that was broken when the officers searched McDonald's room," but held, nevertheless, that "the denial of McDonald's motion was error that was prejudicial to Washington as well," because "*[i]f the property had been returned to McDonald, it would not have been available for use at the trial*" (335 U.S. at 456; emphasis added).

Thus, the Court's reversal of Washington's conviction turned on the fortuitous circumstance that the seized property was returnable to its owner. If the property (like the narcotics involved at bar) had been contraband and hence not returnable (see *United States* v. *Jeffers*, 342 U.S. 48, 54; *Trupiano* v. *United States*, 334 U.S. 699, 710; Rule 41(e), F.R. Crim. P.), then the Court would have had to consider whether Washington's status as a guest in the room gave him standing to challenge the seizure. The Court, however, expressly left that question open.

The second case, *Kremen* v. *United States*, 353 U.S. 346, involved the seizure without warrant of the entire contents of a cabin and their removal to a point some 200 miles distant for the purpose of examining them. It is distinguishable in the vital respect that the petitioners there *were living* in the premises.[15] In this case, however, petitioner denied that he was living in the apartment (*supra*, pp. 6–7, 10–11).

The third case, *United States* v. *Jeffers*, 342 U.S. 48, is different in the critical respect that there the de-

[15] Record, No. 162, Oct. Term, 1956, pp. 117–120, 137–138; and see *Kremen* v. *United States*, 231 F. 2d 155, 158–159 (C.A. 9).

fendant *claimed ownership of the seized property* (narcotics), whereas in this case petitioner claimed no interest in the property. That Jeffers' claim of ownership of the seized property was the decisive element in that case—the factor which gave him standing to suppress—is, we think, clear. It is mentioned four times in the Court's opinion, each time in a context indicative of the controlling importance it had in the decision. 342 U.S. at 49, 50, 52, 54. Thus, *e.g.*, the Court phrased the question presented as the right of an accused to have excluded from evidence "contraband narcotics *claimed by him* which were seized on the premises of other persons in the course of a search without a warrant" (p. 49; emphasis added). Again, in rejecting the contention of the government that "the search did not invade respondent's privacy and that he, therefore, lacked the necessary standing to suppress the evidence seized," the Court said: "The respondent unquestionably had standing to object to the seizure made without warrant or arrest *unless the contraband nature of the narcotics seized precluded his assertion*, for the purposes of the exclusionary rule, *of a property interest therein*" (p. 52; emphasis added). And in the final paragraph of the opinion, the Court stated its holding as follows: "*It* [the seized contraband] *being his property*, for purposes of the exclusionary rule, he was entitled on motion to have it suppressed as evidence on his trial" (p. 54; emphasis added). As we read *Jeffers*, it was precisely Jeffers' claimed proprietary interest in the seized property which gave him the requisite status of a "victim of

[the] unconstitutional search and seizure," with consequent "standing * * * to object to the introduction in evidence of that which was seized" (*Goldstein* v. *United States, supra,* 316 U. S. at 121). For the premises involved in *Jeffers* were (as the Court noted) "the premises of other persons" (342 U.S. at 49), in which Jeffers, consequently, had no proprietary or possessory interest.

(*c*) Petitioner argues that, where (as here) the facts which would show the accused's standing to suppress evidence claimed to have been illegally seized (*e.g.*, possession of the seized contraband) also constitute the substance of a criminal charge against him, he should not be required to plead and prove those facts himself (Br. 32–38). He states that to require this of an accused is "to compel him in effect to choose between his rights under the Fifth Amendment not to incriminate himself and his rights under the Fourth Amendment to be secure from unlawful search" (Br. 35).

While several lower courts have held that incriminatory statements made by a defendant in support of a motion to suppress are admissible against him at the trial,[16] this Court has not decided that question.

[16] *Fowler* v. *United States*, 239 F. 2d 93, 94–95 (C.A. 10); *Kaiser* v. *United States*, 60 F. 2d 410, 413 (C.A. 8), certiorari denied, 287 U.S. 654; *Heller* v. *United States*, 57 F. 2d 627, 629 (C.A. 7), certiorari denied, 286 U.S. 567. These were all cases in which the motion was denied. In *Safarik* v. *United States*, 62 F. 2d 892, 897–898 (C.A. 8), where the motion to suppress was granted, incriminating statements made in support of the motion were held inadmissible against the movant. Cf. Edgerton, Ch. J., dissenting in *Wilkins* v. *United States*, 258 F. 2d 416, 418 (C.A.D.C.), certiorari denied, 357 U.S. 942.

Furthermore, since petitioner's motion to suppress did not claim any interest in the seized property or searched premises, this case does not present the issue whether, if such claim had been made, it could have been introduced against him at the trial. Finally, it is significant that, with a single exception,[17] the federal courts have not relaxed the standing requirement merely because possession of the seized property constituted the substance of the criminal case. *Segurola* v. *United States*, 275 U.S. 106, 111–112; *Connolly* v. *Medalie*, 58 F. 2d 629, 630 (C.A. 2); *Scoggins* v. *United States*, 202 F. 2d 211, 212 (C.A.D.C.); *United States* v. *Eversole*, 209 F. 2d 766, 768 (C.A. 7); *Accardo* v. *United States*, 247 F. 2d 568, 569–570 (C.A.D.C.), certiorari denied, 355 U.S. 898; cf. *Grainger* v. *United States*, 158 F. 2d 236, 238–239 (C.A. 4); *United States* v. *Lee Hee*, 60 F. 2d 924, 926 (C.A. 2); *United States* v. *Edelson*, 83 F. 2d 404, 406 (C.A. 2).

Thus, in *Segurola* v. *United States*, *supra*, where the charge was possession and transportation of liquor in violation of the National Prohibition Act, the defendants, after the government had presented its case at the trial and the liquor had been received in evidence, moved for the first time to suppress its use as evidence on the ground that it had been illegally seized. This Court held that the motion came too late. "[I]n order to raise the question of illegal seizure, and an absence of probable cause in that seizure," the Court said, "the defendants should have moved to have the whiskey and other liquor returned

[17] *United States* v. *Dean*, 50 F. 2d 905, 906 (D. Mass.).

to them *as their property* and as not subject to seizure or use as evidence" (275 U.S. at 112; emphasis added).

While the argument now urged by petitioner does not appear to have been raised or considered in *Segurola*, the court in *Connolly* v. *Medalie*, *supra*, 58 F. 2d 629, gave explicit consideration to the point and rejected it. Speaking for the Second Circuit, Judge Learned Hand stated the controlling rule and its rationale as follows (58 F. 2d at 630):

> The petitions [to suppress] of McGuire and Murray contain even less than Connolly's: they avoid any allegation that they were the owners, or in possession of, the brewery; they say nothing except that they entered while the search was in progress and were arrested. It is true that the officers' answering affidavits allege as a justification for their arrest that they said that they were "operators" of the brewery, and that the officers arrested them as its "owners." The officers' conclusion is immaterial, and, assuming that "operating" would be enough to establish possession, the petitioners did not concede that they had said what the officers put in their mouths. The petition is a pleading; it must squarely allege some violation of the petitioner's rights; else he has no standing. Perhaps he may attend his hold while the proceeding is in progress; perhaps he may accept as true what is alleged against him and go on; but nothing short of that is enough. The difference is substantial. Men may wince at admitting that they were the owners, or in possession, of contraband property; may wish at once to secure the remedies of a possessor, and

> avoid the perils of the part; but equivocation will not serve. If they come as victims, they must take on that role, with enough detail to cast them without question. The petitioners at bar shrank from that predicament; but they were obliged to choose one horn of the dilemma.

2. Finally, petitioner contends (Br. 38, 39) that "[i]f there were question as to the defendant's standing at the pre-trial motion to suppress, Jones's standing ought to have been clear beyond any doubt at the time counsel repeated his objection to the reception of the evidence at the close of the Government's case," which had shown "that Jones occupied and possessed the premises, and that he had proprietary and possessory interest in the materials."

But, unless the facts are not then known or available, a defendant seeking to suppress evidence as illegally seized must make the necessary showing on a motion before trial, including the showing that he is a "person aggrieved." For, as this Court pointed out in *Segurola* v. *United States*, *supra*, 275 U.S. at 111–112:

> * * * except where there has been no opportunity to present the matter in advance of trial, *Gouled* v. *United States*, 255 U.S. 298, 305; *Amos* v. *United States*, 255 U.S. 313, 316; *Agnello* v. *United States*, 269 U.S. 20, 34, a court, when engaged in trying a criminal case, will not take notice of the manner in which witnesses have possessed themselves of papers or other articles of personal property, which are material and properly offered in evidence, because the court will not in trying a criminal cause permit collateral issue to be raised as to

> the source of competent evidence. To pursue it would be to halt in the orderly progress of a cause and consider incidentally a question which has happened to cross the path of such litigation and which is wholly independent of it. * * *

See also *Cogen* v. *United States*, 278 U.S. 221, 223; *Nardone* v. *United States*, 308 U.S. 338, 431–342; *Nunes* v. *United States*, 23 F. 2d 905, 906–907 (C.A. 1).

Gouled v. *United States*, 255 U.S. 298, and *Amos* v. *United States*, 255 U.S. 313, relied on by petitioner (Br. 39–43), are distinguishable. In each of those cases, it developed during the trial that an unconstitutional seizure had occurred: *Gouled*, 255 U.S. at 312–313; *Amos*, 255 U.S. at 316–317.[18] In the circumstances, the Court held that, even though a motion to suppress had been previously denied, the trial court was required to reconsider the question. Here, on the other hand, the only attack on the search had been that the warrant was issued without probable cause, and that contention was based on alleged deficiencies on the face of the warrant. The alleged "new" facts which developed at the trial did not relate to any defects in the search and seizure, but only to the question of petitioner's standing.

[18] Thus, in *Amos*, the Court observed that "the examination and appropriate cross-examination of the Government's witnesses, called to make out its case, shows clearly the unconstitutional character of the seizure by which the property which it introduced was obtained;" that "[t]he facts essential to the disposition of the motion * * * were literally thrust upon the attention of the court by the Government itself" (255 U.S. at 316–317).

Where, as here, it is clear that the defendant, at the time of the pre-trial motion, knew every material fact bearing on the issue of standing, it lay within the sound discretion of the trial judge to consider the matter foreclosed by the denial of the pre-trial motion by another judge, and not to permit the accused to reopen the question and "halt in the orderly progress" of the trial to consider an already settled "collateral issue" (*Segurola* v. *United States, supra,* 275 U.S. at 112). For, as indicated in *Segurola,* the rule of *Gouled* and *Amos* is limited to situations in which "there has been no opportunity to present the matter in advance of trial" (*id.,* 111).

II

THE SEARCH AND SEIZURE WERE VALID

In the district court, petitioner challenged the search and seizure solely on the ground that the warrant was issued without probable cause. The district court did not reach the question, since it held that petitioner had failed to establish standing to attack the search and seizure. In this Court, as in the court of appeals, petitioner raises not only the issue of probable cause, but also contends that the warrant was improperly executed. Although the court of appeals did not discuss petitioner's probable cause argument, we believe that it did consider and reject it.[19] In

[19] After discussing and rejecting petitioner's attack on the manner in which the warrant was executed (R. 85–86), the court concluded that it had "examined the other points raised by appellant and find[s] no error" (R. 86). The only other major point raised by appellant was probable cause. There would have been no occasion for the court to discuss the

any event, we agree with petitioner (Br. 45–46) that this Court should decide the question. For petitioner's argument is that the warrant is defective on its face, and this poses solely a question of law which does not require any further hearing to develop the facts.

We shall argue that probable cause did exist for the issuance of the warrant, and that it was properly executed. Of course, if this Court affirms the holding below on the standing issue, it will be unnecessary to reach the substantive questions. On the other hand, if the Court agrees with us that the search and seizure were valid, the judgment below could be affirmed without having to decide the standing point.

A. THERE WAS PROBABLE CAUSE FOR THE ISSUANCE OF THE SEARCH WARRANT

The search warrant in this case was issued by a United States Commissioner on the basis of an affidavit by a police officer who was a member of the Washington, D.C., Narcotic Squad. The affidavit stated (R. 3) that the officer had received information on the previous day that petitioner and Earline Richardson "were involved in the illicit narcotic traffic"; that they "kept a ready supply of heroin on hand in the" apartment described; that they kept the narcotics "either on their person, under a pillow, on a

manner in which the warrant was executed unless it had first determined that the warrant had been properly obtained. That the court below did consider the probable cause issue is further indicated by the statement in the dissenting opinion of Judge Bazelon that, since he was of the view that the warrant had been illegally executed, he found it "unnecessary to consider the validity of the warrant * * *" (R. 89).

dresser or on a window ledge" in the apartment; that the informant had "on many occasions * * * gone" to the apartment and "purchased narcotic drugs from" these two individuals; that on these occasions "the narcotics were secreated [*sic*] in the" described places; and that "[t]he last time" the informant had made such a purchase was "August 20, 1957 [the very day on which the informant supplied the information]." The information was received from the same source which "has given information to the undersigned on previous occasion and which was correct"; and "[t]his same information, regarding the illicit narcotic traffic, conducted by [petitioner] and Earline Richardson, has been given to the undersigned and the other officers of the narcotic squad by other sources of information" (*ibid.*). "Both the aforementioned persons [petitioner and Richardson]", the affiant further averred, were "familiar to the undersigned and other members of the Narcotic Squad", and "Both have admitted to the use of narcotic drugs and display needle marks as evidence of same" (*ibid.*).

We submit that the Commissioner was fully warranted in concluding (R. 1), on the basis of these allegations, that probable cause existed for the issuance of a warrant to search the apartment. "In dealing with probable cause, * * * as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Brinegar* v. *United States*, 338 U.S. 160, 175, quoted in *Draper* v. *United States*, 358 U.S. 307, 313. Hence, probable

cause exists where "the facts and circumstances within [an officer's] knowledge and of which [he has] reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense has been or is being committed. *Carroll* v. *United States*, 267 U.S. 132, 162, quoted in *Brinegar* v. *United States*, *supra*, 338 U.S. at 175–176, and *Draper* v. *United States*, *supra*, 358 U.S. at 313.[20]

The information which the officer presented to the Commissioner was not, as petitioner contends (Br. 46, 47, 48, 53, 54), a mere "tip" received from an unnamed unreliable informant. On the contrary, the affidavit contained a detailed account of the illegal sale of narcotics in the apartment, given by someone who had made purchases there "on many occasions," the last time being the day on which the information had been supplied. The information stated precisely where the narcotics were hidden ("on their person, under a pillow, on a dresser or on a window ledge"). Such detailed information about the premises showed the reliability of the informant; in addition, he had previously given the officer correct information. The two individuals named as suppliers were known both to the officer and other members of the Narcotic Squad as narcotics users. Finally, the information was corroborated by "other sources of information." In these circumstances, we submit that the officer clearly had probable cause to believe that illicit drugs

[20] To the same effect are: *Husty* v. *United States*, 282 U.S. 694, 700–701; *Dumbra* v. *United States*, 268 U.S. 435, 441; *Steele* v. *United States No. 1*, 267 U.S. 498, 504–505; *Stacey* v. *Emery*, 97 U.S. 642, 645.

would be found on the premises. Cf. *Draper* v. *United States, supra.* By the same token, the Commissioner had probable cause so to believe on the basis of the officer's affidavit.

Since this detailed information as to the conduct of illicit narcotics traffic by known narcotics users, given by a reliable informant known to the officer and corroborated by other sources, was "sufficient * * * to warrant a man of reasonable caution in the belief" that an offense was being committed (*Carroll* v. *United States, supra*), there was no need, as petitioner suggests (Br. 47–48), for the Commissioner to seek an affidavit from, or personally to question, the informant, or to require proof that the officer had investigated the information and determined that it was true. Nor was it fatal that the informant was not identified. Probable cause may be found on the basis of reliable information given by an informant, even though the identity of the latter is not disclosed to the Commissioner—particularly where, as in this case, the information is corroborated by other sources and by the officer's own knowledge that the persons implicated were narcotics users.

B. THE WARRANT WAS LAWFULLY EXECUTED

1. As we have noted, at no time during the proceedings in the district court did petitioner challenge the execution of the warrant. As a result, even though petitioner contradicted the officer's testimony with respect to the manner of execution, the government did not attempt to introduce any additional evidence

which might have corroborated the officer's version. See *Giordenello v. United States*, 357 U.S. 480, 488.

The court of appeals, in holding that the police officer had not violated 18 U.S.C. 3109 in executing the warrant, "accept[ed] as true * * * the testimony of" Officer Didone as to the pertinent facts, though noting that this testimony was "disputed by [petitioner]" (R. 85). While we agree with the dissenting judge that the trial court did not resolve this conflict in testimony, we submit that, since petitioner did not raise the issue in the trial court, this Court should decide the question on the basis of the police officer's testimony as to the manner in which he executed the warrant (construed most favorably to the government) rather than, as petitioner urges (Br. 21, 61), remand the case to the trial court for further hearing. *Giordenello v. United States, supra.*

2. We turn, then, to the question whether, on the basis of Officer Didone's testimony concerning the circumstances attending his execution of the warrant (*supra*, pp. 7–9), the execution was proper under 18 U.S.C. 3109 (*supra*, p. 2). That statute provides in relevant part that an officer executing a search warrant "may break open any outer or inner door or window of a house, or any part of a house" "if, after notice of his authority and purpose, he is refused admittance." Officer Didone testified that prior to the breaking of the night chain on the apartment door, he identified himself to petitioner as a police officer by placing his open wallet, containing his police identification card, inside the slightly opened door, and told petitioner, who was directly behind the door, that

he had a search warrant for the premises (*supra*, pp. 8–9). It was only after the officer saw that he was being refused entry by petitioner, who immediately "tore and went straight back to the bathroom" (R. 37) (presumably for the purpose of flushing the narcotics down the drain), that the officer used force to enter the apartment (*supra*, p. 9).

We submit that in these circumstances, the officer fully complied with the statutory requirement that he give "notice of his authority and purpose" before using force to gain entry. As this Court recently pointed out in *Miller* v. *United States*, 357 U.S. 301, 309, "[t]he burden of making an express announcement is certainly slight." Here the requisite announcement was made. The fact that but a "split second" elapsed betwen the officer's announcement of his purpose and his forcing the chain was not unreasonable in view of the fact that in the interval petitioner manifested his intent not merely to refuse the officer entry but to defeat the objective of the search. *Cf. id.* at 310.

The execution of the warrant was not invalidated, as petitioner contends (Br. 55–60), because the police officers remained mute when petitioner first answered their knock and did not announce their identity and purpose until after petitioner had slightly opened the door in response to the janitor's knock (*supra*, pp. 8–9). As experienced law-enforcement officers on the Narcotic Squad, they were justified in assuming that if they answered the question, "Who's there?", by immediately revealing their identity through the closed (and presumably locked) door, the persons inside

would, before opening the door and admitting the officers, dispose of any contraband drugs in the premises by flushing them down the sink or toilet. Cf. *Gaskins* v. *United States*, 218 F. 2d 47, 48 (C.A. D.C.). This would have taken but a second or two. Indeed, this is precisely what petitioner apparently attempted to do as soon as he became aware of the identity and mission of the officers (*supra*, p. 9). The result of such disposal of the contraband would be to frustrate the purpose of the search.

What the officers did was in substance no different than if, without knocking at all, they posted themselves outside the door of the apartment and waited until somebody opened it before identifying themselves, disclosing their purpose, and demanding admission. In such circumstances, they could hardly be criticized for not previously announcing their presence.

The reasonableness of the execution of a search warrant must be judged in the light of the property to be seized. Where the property is bulky and not readily discardable (*e.g.*, a still or a stolen automobile), the officer serving the warrant may perhaps be required to identify himself and state his purpose immediately upon being questioned. But where, as here, the property is almost instantly destructible or disposable, we submit that the police are not required to execute a search warrant in a way that facilitates disposal of the very object of the search. The purpose of requiring the police to give notice of their "authority and purpose" prior to breaking into a house is to "secure the common interest against un-

lawful invasion of the house," *Miller* v. *United States*, 357 U.S. 301, 313. The requirement should not be interpreted so as to give the occupant an opportunity to conceal or destroy the property to be seized.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court of appeals should be affirmed.

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OCTOBER 1959.

SUPREME COURT OF THE UNITED STATES

No. 69.—October Term, 1959.

Cecil Jones, Petitioner, v. United States of America. | On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[March 28, 1960.]

Mr. Justice Frankfurter delivered the opinion of the Court.

This is a prosecution for violation of federal narcotics laws. In the first count of a two-count indictment petitioner was charged with having "purchased, sold, dispensed and distributed" narcotics in violation of 26 U. S. C. § 4704 (a), that is, not in or from the "original stamped package." In the second count petitioner was charged under 21 U. S. C. § 174 with having "facilitated the concealment and sale of" the same narcotics, knowing them to have been imported illegally into the United States. Petitioner was found guilty on both counts and sentenced to seven years' imprisonment. The Court of Appeals, one judge dissenting, affirmed the conviction. 262 F. 2d 234. Since the case presented important questions in the administration of criminal justice, more particularly a defendant's standing to challenge the legality of a search in the circumstances of this case, as well as the legality of the particular search should standing be established, we granted certiorari. 359 U. S. 988.

Both statutory provisions under which petitioner was prosecuted permit conviction upon proof of the defendant's possession of narcotics, and in the case of 26 U. S. C. § 4704 (a) of the absence of the appropriate stamps. Possession was the basis of the Government's case against

petitioner. The evidence against him may be briefly summarized. He was arrested in an apartment in the District of Columbia by federal narcotics officers, who were executing a warrant to search for narcotics. Those officers found narcotics, without appropriate stamps, and narcotics paraphernalia in a bird's nest in an awning just outside a window in the apartment. Another officer, stationed outside the building, had a short time before seen petitioner put his hand on the awning. Upon the discovery of the narcotics and the paraphernalia petitioner had admitted to the officers that some of these were his and that he was living in the apartment.

Prior to trial petitioner duly moved to suppress the evidence obtained through the execution of the search warrant on the ground that the warrant had been issued without a showing of probable cause. The Government challenged petitioner's standing to make this motion because petitioner alleged neither ownership of the seized articles, nor an interest in the apartment greater than that of an "invitee or guest." The District Court agreed to take evidence on the issue of petitioner's standing. Only petitioner gave evidence. On direct examination he testified that the apartment belonged to a friend, Evans, who had given him the use of it, and a key, with which petitioner had admitted himself on the day of the arrest. On cross-examination petitioner testified that he had a suit and shirt at the apartment, that his home was elsewhere, that he paid nothing for the use of the apartment, that Evans had let him use it "as a friend," that he had slept there "maybe a night," and that at the time of the search Evans had been away in Philadelphia for about five days.

Solely on the basis of petitioner's lack of standing to make it, the district judge denied petitioner's motion to suppress. When the case came on for trial before a different judge, the motion to suppress was renewed and was

denied on the basis of the prior ruling. An unsuccessful objection was made when the seized items were offered in evidence at the trial.

In affirming petitioner's conviction the Court of Appeals agreed with the District Court that petitioner lacked standing, but proceeded to rule that even if it were to find that petitioner had standing, it would hold the evidence to have been lawfully received. A challenge to the search which petitioner had not made in the District Court, namely, that the method of executing the warrant had been illegal, was considered by the Court of Appeals and rejected, while the contention petitioner had made below, that there had been insufficient cause to issue the warrant, was rejected without discussion.

The issue of petitioner's standing is to be decided with reference to Rule 41 (e) of the Federal Rules of Criminal Procedure. This is a statutory direction governing the suppression of evidence acquired in violation of the conditions validating a search. It is desirable to set forth the Rule.

> "A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to

suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefore did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing."

In order to qualify as a "person aggrieved by an unlawful search and seizure" one must have been a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else. Rule 41 (e) applies the general principle that a party will not be heard to claim a constitutional protection unless he "belongs to the class for whose sake the constitutional protection is given." *Hatch* v. *Reardon*, 204 U. S. 152, 160. The restrictions upon searches and seizures were obviously designed for protection against official invasion of privacy and the security of property. They are not exclusionary provisions against the admission of kinds of evidence deemed inherently unreliable or prejudicial. The exclusion in federal trials of evidence otherwise competent but gathered by federal officials in violation of the Fourth Amendment is a means for making effective the protection of privacy.

Ordinarily, then, it is entirely proper to require of one who seeks to challenge the legality of a search as the basis for suppressing relevant evidence that he allege, and if the allegation be disputed that he establish, that he himself was the victim of an invasion of privacy. But prosecutions like this one have presented a special problem. To establish "standing," Courts of Appeals have generally required that the movant claim either to have owned or possessed the seized property or to have had a substantial possessory interest in the premises searched. Since

narcotics charges like those in the present indictment may be established through proof solely of possession of narcotics, a defendant seeking to comply with what has been the conventional standing requirement has been forced to allege facts the proof of which would tend, if indeed not be sufficient, to convict him. At the least, such a defendant has been placed in the criminally tendentious position of explaining his possession of the premises. He has been faced, not only with the chance that the allegations made on the motion to suppress may be used against him at the trial, although that they may is by no means an inevitable holding, but also with the encouragement that he perjure himself if he seeks to establish "standing" while maintaining a defense to the charge of possession.

The dilemma that has thus been created for defendants in cases like this has been pointedly put by Judge Learned Hand:

> "Men may wince at admitting that they were the owners, or in possession, of contraband property; may wish at once to secure the remedies of a possessor, and avoid the perils of the part; but equivocation will not serve. If they come as victims, they must take on that role, with enough detail to cast them without question. The petitioners at bar shrank from that predicament; but they were obliged to choose one horn of the dilemma." *Connolly* v. *Medalie*, 58 F. 2d 629, 630.

Following this holding, several Courts of Appeals have pinioned a defendant within this dilemma. See, *e. g.*, *Scoggins* v. *United States*, 202 F. 2d 211, 212; *United States* v. *Eversole*, 209 F. 2d 766, 768; *Accardo* v. *United States*, 247 F. 2d 568, 569–570; *Grainger* v. *United States*, 158 F. 2d 236. A District Court has held otherwise, *United States* v. *Dean*, 50 F. 2d 905, 906 (D. C. Mass.). The Government urges us to follow the body of Court of

Appeals' decisions and to rule that the lower courts, including the courts below, have been right in barring a defendant in a case like this from challenging a search because of his failure, when making his motion to suppress, to allege either that he owned or possessed the property seized or that he had a possessory interest in the premises searched greater than the interest of an "invitee or guest."

Judge Hand's dilemma is not inescapable. It presupposes requirements of "standing" which we do not find compelling. Two separate lines of thought effectively sustain defendant's standing in this case. (1) The same element in this prosecution which has caused a dilemma, *i. e.*, that possession both convicts and confers standing, eliminates any necessity for a preliminary showing of an interest in the premises searched or the property seized, which ordinarily is required when standing is challenged. (2) Even were this not a prosecution turning on illicit possession, the legally requisite interest in the premises was here satisfied, for it need not be as extensive a property interest as was required by the courts below.

As to the first ground, we are persuaded by this consideration: to hold to the contrary, that is, to hold that petitioner's failure to acknowledge interest in the narcotics or the premises prevented his attack upon the search, would be to permit the Government to have the advantage of contradictory positions as a basis for conviction. Petitioner's conviction flows from his possession of the narcotics at the time of the search. Yet the fruits of that search, upon which the conviction depends, were admitted into evidence on the ground that petitioner did not have possession of the narcotics at that time. The prosecution here thus subjected the defendant to the penalties meted out to one in lawless possession while refusing him the remedies designed for one in that situation. It is not consonant with the amenities, to put it mildly,

of the administration of criminal justice to sanction such squarely contradictory assertions of power by the Government. The possession on the basis of which petitioner is to be and was convicted suffices to give him standing under any fair and rational conception of the requirements of Rule 41 (e).

The Government's argument to the contrary essentially invokes *elegantia juris*. In the interest of normal procedural orderliness, a motion to suppress, under Rule 41 (e), must be made prior to trial, if the defendant then has knowledge of the grounds on which to base the motion. The Government argues that the defendant therefore must establish his standing to suppress the evidence at that time through affirmative allegations and may not wait to rest standing upon the Government's case at the trial. This provision of Rule 41 (e), requiring the motion to suppress to be made before trial, is a crystalization of decisions of this Court requiring that procedure, and is designed to eliminate from the trial disputes over police conduct not immediately relevant to the question of guilt. See *Nardone* v. *United States*, 308 U. S. 338, 341–342; *Segurola* v. *United States*, 275 U. S. 106, 111–112; *Agnello* v. *United States*, 269 U. S. 20, 34; *Adams* v. *New York*, 192 U. S. 585. As codified, the rule is not a rigid one, for under Rule 41 (e) "the court in its discretion may entertain the motion [to suppress] at the trial or hearing." This qualification proves that we are dealing with carrying out an important social policy and not a narrow, finicky procedural requirement. This underlying policy likewise precludes application of the Rule so as to compel the injustice of an internally inconsistent conviction. In cases where the indictment itself charges possession, the defendant in a very real sense is revealed as a "person aggrieved by an unlawful search and seizure" upon a motion to suppress evidence prior to trial. Rule 41 (e) should not be applied to allow the Government

to deprive the defendant of standing to bring a motion to suppress by framing the indictment in general terms, while prosecuting for possession.[1]

As a second ground sustaining "standing" here we hold that petitioner's testimony on the motion to suppress made out a sufficient interest in the premises to establish him as a "person aggrieved" by their search. That testimony established that at the time of the search petitioner was present in the apartment with the permission of Evans, whose apartment it was. The Government asserts that such an interest is insufficient to give standing. The Government does not contend that only ownership of the premises may confer standing. It would draw distinctions among various classes of possessors, deeming some, such as "guests" and "invitees" with only the "use" of the premises, to have too "tenuous" an interest although concededly having "some measure of control" through their "temporary presence," while conceding that others, who in a "realistic sense, have dominion of the apartment" or who are "domiciled" there, to have standing. Petitioner, it is insisted, by his own testimony falls in the former class.

While this Court has never passed upon the interest in the searched premises necessary to maintain a motion to suppress, the Government's argument closely follows the prevailing view in the lower courts. They have denied standing to "guests" and "invitees," (*e. g., Gasiins* v. *United States*, 218 F. 2d 47, 48; *Gibson* v. *United States*, 149 F. 2d 381, 384; *In re Nassetta*, 125 F. 2d 924; *Jones* v. *United States*, 262 F. 2d 234), and employees, who though

[1] Ordinarily the Government should choose between opposing a motion to suppress made before trial and basing the case upon possession, but if necessary the District Court's discretion to hear the motion to suppress during trial may be invoked. The Government must, in any case, not permit a conviction to be obtained on the basis of possession, without the merits of a duly made motion to suppress having been considered.

in "control" or "occupancy" lacked "possession" (*e. g., Connolly* v. *Medalie*, 58 F. 2d 629, 630; *United States* v. *Conoscente*, 63 F. 2d 811). The necessary quantum of interest has been distinguished as being, variously, "ownership in or right to possession of the premises" (*e. g., Jeffers* v. *United States*, 187 F. 2d 498, 501), the interest of a "lessee or licensee" (*United States* v. *De Bousi*, 32 F. 2d 902), or of one with "dominion" (*McMillan* v. *United States*, 26 F. 2d 58, 60; *Steeber* v. *United States*, 198 F. 2d 615, 617). We do not lightly depart from this course of decisions by the lower courts. We are persuaded, however, that it is unnecessary and ill-advised to import into the law surrounding the constitutional right to be free from unreasonable searches and seizures subtle distinctions, developed and refined by the common law in evolving the body of private property law which, more than almost any other branch of law, has been shaped by distinctions whose validity is largely historical. Even in the area from which they derive due consideration has led to the discarding of these distinctions in the homeland of the common law. See Occupiers' Liability Act, 1957, 5 and 6 Eliz. 2, c. 31, carrying out, Law Reform Committee, Third Report, Cmd. 9305. Distinctions such as those between "lessee," "licensee," "invitee" and "guest," often only of gossamer strength, ought not to be determinative in fashioning procedures ultimately referable to constitutional safeguards.

We rejected such distinctions as inappropriate to the law of maritime torts in *Kermarec* v. *Compagnie Generale*, 358 U. S. 625, 630–632. We found there to be a duty of ordinary care to one rightfully on the ship, regardless of whether he was a "licensee" rather than an "invitee." "For the admiralty law at this late date to import such conceptual distinctions would be foreign to its traditions of simplicity and practicality." 358 U. S., at 631. *A fortiori* we ought not to bow to them in the fair administration of the criminal law. To do so would not comport with

our justly proud claim of the procedural protections accorded to those charged with crime. No just interest of the Government in the effective and rigorous enforcement of the criminal law will be hampered by recognizing that anyone legitimately on premises where a search occurs may challenge its legality by way of a motion to suppress, when its fruits are proposed to be used against him. This would of course not avail those who, by virtue of their wrongful presence, cannot invoke the privacy of the premises searched. As petitioner's testimony established Evan's consent to his presence in the apartment, he was entitled to have the merits of his motion to suppress adjudicated.

We come to consider the grounds upon which the search is alleged to have been illegal. The attack which was made in the District Court was one of lack of probable cause for issuing the search warrant. The question raised is whether sufficient evidence to establish probable cause to search was put before the Commissioner by the officer, Didone, who applied for the warrant. The sole evidence upon which the warrant was issued was an affidavit signed by Didone. Both parties urge us to decide the question here, without remanding it to the District Court which, because it found lack of standing, did not pass on it. We think it appropriate to decide the question.

The affidavit is set out in the margin.[2] Didone was a member of the Narcotic Squad in the District of Columbia.

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[2] "Affidavit in Support of a U. S. Commissioners Search Warrant for Premises 1436 Meridian Place, N. W., Washington, D. C., apartment 36, including window spaces of said apartment. Occupied by Cecil Jones and Earline Richardson.

"In the late afternoon of Tuesday, August 20, 1957, I, Detective Thomas Didone, Jr. received information that Cecil Jones and Earline Richardson were involved in the illicit narcotic traffic and that they kept a ready supply of heroin on hand in the above mentioned apartment. The source of information also relates that the two afore-

His affidavit claimed no direct knowledge of the presence of narcotics in the apartment. He swore that on the day before making the affidavit he had been given information, by one unnamed, that petitioner and another "were involved in the illicit narcotic traffic" and "kept a ready supply of heroin on hand" in the apartment. He swore that his informant claimed to have purchased narcotics at the apartment from petitioner and another "on many occasions," the last of which had been the day before the warrant was applied for. Didone swore that his informant "has given information to the undersigned on previous occasion and which was correct," that "[t]his same information" regarding petitioner had been given the narcotics squad by "other sources of information" and that

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mentioned persons kept these same narcotics either on their person, under a pillow, on a dresser or on a window ledge in said apartment. The source of information goes on to relate that on many occasions the source of information has gone to said apartment and purchased narcotic drugs from the above mentioned persons and that the narcotics were secreated [*sic*] in the above mentioned places. The last time being August 20, 1957.

"Both the aforementioned persons are familiar to the undersigned and other members of the Narcotic Squad. Both have admitted to the use of narcotic drugs and display needle marks as evidence of same.

"This same information, regarding the illicit narcotic traffic, conducted by Cecil Jones and Earline Richardson, has been given to the undersigned and to other officers of the narcotic squad by other sources of information.

"Because the source of information mentioned in the opening paragraph has given information to the undersigned on previous occasion and which was correct, and because this same information is given by other sources does believe that there is now illicit narcotic drugs being secreated [*sic*] in the above apartment by Cecil Jones and Earline Richardson.

"Det. Thomas Didone, Jr., Narcotic Squad, MPDC.

"Subscribed and sworn to before me this 21 day of August, 1957

"James F. Splain, U. S. Commissioner, D. C."

the petitioner and the other implicated by the informant had admitted being users of narcotics. On this basis Didone founded his oath "that there is now illicit narcotic drugs being secreated [*sic*] in the above apartment by Cecil Jones."

This affidavit was, it is claimed, insufficient to establish probable cause because it did not set forth the affiant s personal observations regarding the presence of narcotics in the apartment, but rested wholly on hearsay. We held in *Nathanson* v. *United States*, 290 U. S. 41, that an affidavit does not establish probable cause which merely states the affiant's belief that there is cause to search, without stating facts upon which that belief is based. *A fortiori* this is true of an affidavit which states only the belief of one not the affiant. That is not, however, this case. The question here is whether an affidavit which sets out personal observations relating to the existence of cause to search is to be deemed insufficient by virtue of the fact that it sets out not the affiant's observations but those of another. An affidavit is not to be deemed insufficient on that score, so long as a substantial basis for crediting the hearsay is presented.

In testing the sufficiency of probable cause for an officer's action even without a warrant, we have held that he may rely upon information received through an informant, rather than upon his direct observations, so long as the informant's statement is reasonably corroborated by other matters within the officer's knowledge. *Draper* v. *United States*, 358 U. S. 307. We there upheld an arrest without a warrant solely upon an informant's statement that the defendant was peddling narcotics, as corroborated by the fact that the informant's description of the defendant's appearance, and of where he would be on a given morning (matters in themselves totally innocuous) agreed with the officer's observations. We rejected the contention that an officer may act without a warrant only when his basis for acting would be com-

petent evidence upon a trial to prove defendant's guilt. Quoting from *Brinegar* v. *United States*, 338 U. S. 160, 172, we said that such a contention "goes much too far in confusing and disregarding the difference between what is required to prove guilt in a criminal case and what is required to show probable cause for arrest or search. . . . There is a large difference between the two things to be proved [guilt and probable cause] . . . and therefore a like difference in the *quanta* and modes of proof required to establish them." 358 U. S., at 311–312. The dictum to the contrary in *Grau* v. *United States*, 287 U. S. 124, 128, was expressly rejected in *Draper*. 358 U. S., at 312, n. 4. See also Judge Learned Hand in *United States* v. *Heitner*, 149 F. 2d 105, 106.

What we have ruled in the case of an officer who acts without a warrant, governs our decision here. If an officer may act upon probable cause without a warrant when the only incriminating evidence in his possession is hearsay, it would be incongrous to hold that such evidence presented in an affidavit is insufficient basis for a warrant. If evidence of a more judicially competent or persuasive character than would have justified an officer in acting on his own without a warrant must be presented when a warrant is sought, warrants could seldom legitimatize police conduct, and resort to them would ultimately be discouraged. Due regard for the safeguards governing arrests and searches counsel the contrary. In a doubtful case, when the officer does not have clearly convincing evidence of the immediate need to search, it is most important that resort be had to a warrant, so that the evidence in the possession of the police may be weighed by an independent judicial officer, whose decision, not that of the police, may govern whether liberty or privacy is to be invaded.

We conclude therefore that hearsay may be the basis for a warrant. We cannot say that there was so little basis for accepting the hearsay here that the Commissioner

acted improperly. The Commissioner need not have been convinced of the presence of narcotics in the apartment. He might have found the affidavit insufficient and withheld his warrant. But there was substantial basis for him to conclude that narcotics were probably present in the apartment, and that is sufficient. It is not suggested that the Commissioner doubted Didone's word. Thus we may assume that Didone had the day before been told by one who claimed to have bought narcotics there, that petitioner was selling narcotics in the apartment. Had that been all, it might not have been enough; but Didone swore to a basis for accepting the informant's story. The informant had previously given accurate information. His story was corroborated by other sources of information. And petitioner was known by the police to be a user of narcotics. Corroboration through other sources of information reduced the chances of a reckless or prevaricating tale; that petitioner was a known user of narcotics made the charge against him much less subject to scepticism than would be such a charge against one without such a history.

Petitioner argues that the warrant was defective because Didone's informants were not produced, because his affidavit did not even state their names, and Didone did not undertake and swear to the results of his own independent investigation of the claims made by his informants. If the objections raised were that Didone had misrepresented to the Commissioner his basis for seeking a warrant, these matters might be relevant. Such a charge is not made. All we are here asked to decide is whether the Commissioner acted properly, not whether Didone did. We have decided that, as hearsay alone does not render an affidavit insufficient, the Commissioner need not have required the informants or their affidavits to be produced, or that Didone have personally made inquiries

about the apartment, so long as there was a substantial basis for crediting the hearsay.

In the Court of Appeals petitioner presented an additional attack upon the legality of the search, namely, that the warrant was not executed in conformity with 18 U. S. C. § 3109.[3] Since petitioner did not, with ample opportunity to do so, make this claim in the District Court, we should not ordinarily consider it here had the Court of Appeals refused for that reason to entertain it. The Court of Appeals, however, fully considered the claim and rejected it; nor does the Government contend that it is not properly before us. In these circumstances we hold that the question of the legality of the execution of the search warrant under 18 U. S. C. § 3109 is open for our decision.

Unlike the claim of lack of probable cause, this contention is not one which can satisfactorily be resolved upon the record before us. As *Miller* v. *United States*, 357 U. S. 301, demonstrated, a claim under 18 U. S. C. § 3109 depends upon the particular circumstances surrounding the execution of the warrant. The trial revealed a direct conflict in testimony on this matter. We cannot yield to the Government's suggestion that we ignore that conflict and consider the question on the version of the warrant's execution given at the trial most favorable to the prosecution. We therefore vacate the decision of the Court of Appeals and remand the case to the District Court to consider petitioner's contention under 18 U. S. C. § 3109, in light of our decision that petitioner had standing to make it.

Vacated and remanded.

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[3] "The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant."

SUPREME COURT OF THE UNITED STATES

No. 69.—October Term, 1959.

Cecil Jones, Petitioner, v. United States of America. | On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[March 28, 1960.]

Mr. Justice Douglas.

I join the part of the opinion which holds that petitioner had "standing" to challenge the legality of the search. But I dissent from the ruling that there was "probable cause" for issuance of the warrant. The view that there was "probable cause" finds some support in *Draper* v. *United States*, 358 U. S. 307. But my dissent in *Draper* gives, I think, the true dimensions of the problem. This is an age where faceless informers have been reintroduced into our society in alarming ways. Sometimes their anonymity is defended on the ground that revelation of their names would ruin counter-espionage or cripped an underground network of agents. Yet I think in these Fourth Amendment cases the duty of the magistrate is nondelegable. It is not sufficient that the police think there is cause for an invasion of the privacy of the home. The judicial officer must also be convinced; and to him the police must go except for emergency situations. The magistrate should know the evidence on which the police propose to act. Unless that is the requirement, unless the magistrate makes his independent judgment on all the known facts, then he tends to become merely the tool of police interests. Though the police are honest and their aims worthy, history shows they are not appropriate guardians of the privacy which the Fourth Amendment protects.